RECONSTITUTING REPRESENTATION: THE SUPREME COURT AND THE RHETORICAL CONTROVERSY OVER STATE AND CONGRESSIONAL REDISTRICTING

A Dissertation

by

JEREMIAH PETER HICKEY

Submitted to the Office of Graduate Studies of
Texas A&M University
in partial fulfillment of the requirements for the degree of

DOCTOR OF PHILOSOPHY

December 2008

Major Subject: Communication

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ABSTRACT

Reconstituting Representation: The Supreme Court and the Rhetorical Controversy over State and Congressional Redistricting.

(December 2008)

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Constitutive rhetoric focuses on the idea that in times of historical crisis, speakers possess the ability to repair the language of the community and reshape the identity of the community. This dissertation relies upon the concept of constitutive rhetoric to examine the Supreme Court's reapportionment and redistricting decision. By employing constitutive rhetoric, the Supreme Court reacts to the crisis of representation because of malapportionment and redistricting to transform our Constitutional republic to a Constitutional democracy and, further, to debate competing visions of representation and democracy necessary to sustain political life and the democratic experience.

Chapter I offers readers a literature review on constitutive rhetoric, a literature review on reapportionment and redistricting, and presents readers with an outline of the dissertation. Chapter II provides a brief history of redistricting in the United States since Colonial times, the development of apportionment and redistricting law at the state court level, and the Supreme Court's invention of a rhetorical tradition in apportionment and districting law before the Reapportionment Revolution. In the last section of Chapter II, I

argue that the Pre-Revolution Supreme Court cases weakened the authority of the rhetorical tradition of judicial deferment. Chapter III examines the Supreme Court's decision in *Baker* v. *Carr*, which reconstitutes the authority of the judiciary in apportionment and redistricting law by redefining the meaning of voting rights and the political questions doctrine, as well as reconceptualizing the law behind voting rights. Further, this chapter outlines the new role of the judiciary in American society and the ethos of judicial restraint that is to guide apportionment and redistricting cases.

Chapter IV examines the development of the new rhetorical tradition in apportionment law from the Reapportionment Revolution cases of *Gray* v. *Sanders*, *Wesberry* v. *Sander*, *Reynolds* v. *Sims*, and the rest of the Supreme Court cases form the 1960s. In this new rhetorical tradition, the Supreme Court reconstitutes the American republican to create a legal and moral American democracy, a form of government that rests on the development of the democratic experience and the expansion of the right to vote at the local, state, and federal level. Chapter V examines the Supreme Court cases during the 1970s and the 1980s where, because of their ideological divisions, the Justices offer the American people competing visions of representation and democracy in an attempt to gain interpretive dominance for their visions. Finally, Chapter VI examines the Supreme Court's decisions from the 1990s and 2000s. In these decisions, the Justices debate the best means to achieve racial reconciliation through apportionment and redistricting law and the best formation of democracy to secure that reconciliation.

DEDICATION

I dedicate this text to the development of the democratic experience and the fulfillment of the American promise.

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CHAPTER I

INTRODUCTION: CONSTITUTIVE RHETORIC, THE SUPREME COURT, AND THE DEVELOPMENT OF THE LAW

"I Hear America Singing, the Varied Carols I Hear,"

I HEAR America singing, the varied carols I hear;
Those of mechanics—each one singing his, as it should be, blithe and strong;
The carpenter singing his, as he measures his plank or beam,
The mason singing his, as he makes ready for work, or leaves off work;
The boatman singing what belongs to him in his boat—the deckhand singing on the steamboat deck;
The shoemaker singing as he sits on his bench—the hatter singing as he stands;
The wood-cutter's song—the ploughboy's, on his way in the morning, or at the noon intermission, or at sundown;
The delicious singing of the mother—or of the young wife at work—or of the girl sewing or washing—Each singing what belongs to her, and to none else;
The day what belongs to the day—At night, the party of young fellows, robust, friendly,

Singing, with open mouths, their strong melodious songs. Walt Whitman, *Leaves of Grass*[1]

This dissertation follows the style of the *Quarterly Journal of Speech*.

[1] Walt Whitman, "I Hear America Singing, the Varied Carols I Hear," *Whitman: Poetry and Prose*, (New York: Library of America College Edition, 1996), 174.

"I, Too, Sing America,"

I too, sing America. I am the darker brother.
They send me to eat in the kitchen
When company comes,
But I laugh,
And eat well,
And grow strong. Tomorrow,
I'll be at the table
When company comes.
Nobody'll dare
Say to me,
"Eat in the kitchen,"
Then. Besides, They'll see how beautiful I am
And be ashamed—

I, too, am America—Langston Hughes, *The Collected Poems of Langston Hughes*[2]

The Politics of Democracy

In June of 2006, the Supreme Court released its decision in *League of United Latin American Citizens* v. *Perry,* 548 U.S. 399 (2006). The decision by the High Court ended a four-year legal battle over a redistricting plan and provided a temporary reprieve into an area of law politicized by citizens, state legislators, special interests, and the Justices themselves. Back in 2002, the Texas State Legislature failed to complete its constitutional duty of redistricting the state and Congressional legislative districts as the state Democrats believed that the plan was too partisan, drastically favoring the Republican Party. Since the political balanced legislature could not secure a redistricting plan, the responsibility for the plan transitioned to the Texas State Courts as required by state law. However,

[2] Langston Hughes, "I, Too, Sing America" *The Collected Poems of Langston Hughes*, (New York: Alfred Knopf, 2002), 46.

Republicans at the state or national level despised the results of the court-ordered plan as it retained a Democrat advantage in the state and did not reflect the change in the state's demographics and voting record. Since a changed occurred in the voting behavior of the citizens, then a change should occur in the electoral districts that would reflect that behavior. Tom Delay (R- Sugar Land), the Congressional Republican House Leader, stated, "Democrats lost their majority, and they can't stand it."[3] Like Delay, most Republicans, at the state and national level, desired a "proportional" plan that reflected the political beliefs and practices of the citizens of Texas.

The reapportionment plan for Texas not only focused on local politics as the plan constituted an attempt by one political party to gain and maintain power nationally. According to Rep. Richard Raymond (D-Laredo), the redistricting plan by Tom Delay was part of a national plan: "If he [Delay] could get Texas, the other states would domino."[4] The Texas effort was one of three states in which Republicans attempted to advance their power through districting as efforts in Pennsylvania, which was successful, and in Colorado, which was not, helped to create and advance a Republican advantage in Congress. The implication here is clear: if Republicans could grab power and more seats in Texas, then they would be able to push through more of their legislation nationally.

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[3] R.G. Ratcliffe, John Williams, Melissa Drosjack, Armando Villafrance, "On the Lam in Oklahoma: Fugitive Democrats, GOP Point Fingers Across Red River," *The Houston Chronicle,* 14 May 2003 A1.

[4] R.G. Ratcliffe, John Williams, Melissa Drosjack, Armando Villafrance, "On the Lam in Oklahoma: Fugitive Democrats, GOP Point Fingers Across Red River," *The Houston Chronicle,* 14 May 2003 A1.

Republicans held these sentiments as well. Phil King, (R-Weatherford), author of the House map, stated "I would like to do that to help President Bush with his agenda."

Even though Texas Republicans tried to steamroll the Democrats, the Democrats in Texas attempted to fight back. "This is not about Democrats. It's about democracy," Sen. Leticia Van de Putte, (D- San Antonio) declared in July of 2003 after Texas State Democrats evacuated Texas— for a second time, the first to Oklahoma and the second to New Mexico—in order to protest and prevent the Texas Republicans from enacting a mid-decade redistricting plan in Texas.[5] The Democrats cried "foul" over the actions of the Republicans. Rather than saying the plan is unfair, the Democrats attacked the Republicans for altering the foundation of the country—the electoral process. The Democrats believed that the Republicans altered the districts of Texas not to serve the interests of the citizens, but rather to serve the interests of the party. This act of redistricting was purely of political motives.

Furthermore, Democrats questioned the motives of the Texas Republicans, attempting to associate this plan within the history of racial discrimination in Texas. When she explained the actions of Democrats, Van de Putte stated, "When the congressional districts of those Democrats targeted by Republicans are eliminated, over 1.4 million minority Texans will have no advocates because their home will be drawn into districts in which they will have no voice in choosing their members of Congress."[6] In

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[5] Clay Robison and Janet Elliot, "Texas Democrats on the Run Again: Senators Launch Redistricting Boycott," *The Houston Chronicle,* 29 July 2003 A1.

[6] Clay Robison and Janet Elliot, "Texas Democrats on the Run Again," A1.

addition to losing minority voters, Representative Martin Frost—one of the four Democrats who would later find himself drawn out of office—believed that the 2003 plan would decrease representation of Anglo—Democrats in Texas. According to *The New York Times*, Frost stated that the Texas Republicans wanted to redefine the political parties ensuring that "white voters will not identify with the Democratic party."[7] Bob Stein, a professor of political science at Rice University, claimed that the Republican strategy in the redistricting process was to put a black and Hispanic face on the Democratic Party.[8] Of course, Stein added, that he hesitated to declare the redistricting process as being purely racial since the packing of minorities in districts would reduce the influence of Democrats throughout the state.[9] Further, Stein added, that when the Democrats were the majority party in Texas, they were "hardly averse to their own racial manipulation. Why else . . . were so many white Democrats representing blacks?"[10]

Soon after the Democrats returned from their trip to New Mexico and Governor Rick Perry called for the state's third special legislative session of 2003, the State Representatives passed a redistricting plan only after the Republicans changed the procedural rules to ensure the vote required a majority and not a supermajority. After the political parties "agreed" on the new redistricting plan, the Democrats filed suits in three

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[7] Ralph Blumenthal, "Texas Democrats Look at New Map and Point out Victims," *The New York Times,* 14 October 2003 A14.

[8] Ralph Blumenthal, "Texas Democrats Look at New Map and Point out Victims," A14.

[9] Ralph Blumenthal, "Texas Democrats Look at New Map and Point out Victims," A14.

[10] Ralph Blumenthal, "Texas Democrats Look at New Map and Point out Victims," A14.

cases throughout the state, claiming that the newly created districts were unconstitutional political and racial gerrymanders. After months of litigation in the court system, which consisted of three appeals to the Fifth Circuit Court of Appeals, and one petition to the Supreme Court, the Supreme Court remanded one of the cases, *Sessions* v. *Perry*, back to the State Court, affirming the 2003 redistricting plan. At first, the fate of the 2003 redistricting plan rested with the Supreme Court's 2004 decision of *Vieth* v. *Jubelirer*, 541 U.S. 267 (2004), in which a plurality of the Court ruled that political gerrymandering cases were no longer justiciable. In light of *Vieth*, the Court in *Sessions* ruled that the Texas redistricting case was a political but not racial gerrymander as the plaintiffs failed to establish a case under §2 of the Voting Rights Act (VRA).[11] In 2006, the Supreme Court reversed the decision of the lower court in part, ruling that two districts violated §2 under the VRA but refused to rule the redistricting plan presented an unconstitutional partisan gerrymander. After years of four years of fighting, the Texas State Republicans, according to Justice Stephen Breyer, were able to entrench themselves through redistricting without regard the consequences of the political process.[12] According to this vision of democracy, the Texas State Republicans subverted the democratic experience and a majority of Justices on the Supreme Court possessed little desire to ensure citizens could elect representatives of their choice.

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[11] *Session* v. *Perry*, 298 F. Supp. 2d 451, 457 (2004).

[12] *L.U.L.A.C. v. Perry*, 548 U.S. 399, 492 (2006).

In *Democracy in America*, Alexis de Tocqueville credits the Supreme Court for preserving the peace, prosperity, and existence of the United States.[13] He wrote that the "peace, the prosperity, and the existence of the Union are vested in the hands" of the justices of the Supreme Court.[14] The reasons? The Supreme Court provides meaning to the Constitution and defends the Constitution against internal threats:

> Without their active cooperation the Constitution would be a dead letter: the Executive appeals to them for assistance against the encroachments of the Legislative powers; the Legislature demands their protection from the designs of the Executive; they defend the Union from the disobedience of the States, the States from the exaggerated claims of the Union; the public interest against the interests of private citizens, and the conservative spirit of order against the fleeting innovations of democracy.[15]

By acting as a guardian, the Supreme Court protects the rights of citizens in the democratic process and protects the competing branches of government from one another. Tocqueville believes that as long as the Justices clothe their decisions in the authority of public opinion and remain prudent men, then the Court preserves the Union before it plunged into anarchy.[16]

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[13] Alexis de Tocqueville, *Democracy in America,* (New York: Bantam Books, 2000), 170.

[14] Alexis de Tocqueville, *Democracy in America,* 170.

[15] Alexis de, Tocqueville, *Democracy in America*, 171.

[16] Alexis de, Tocqueville, *Democracy in America*, 171. Note: there is subtle irony in de Tocqueville's discussion of the Court. De Tocqueville remarks that, "If the Supreme Court is ever composed of imprudent men or bad citizens, the Union may be plunged into anarchy or civil war," (171).

Throughout its history, some of the most important and most controversial decisions center on the Supreme Court's ability to shape the democratic experience in its reapportionment and redistricting cases. In 1962, the Supreme Court initiated the "The Reapportionment Revolution" when it released its decision in *Baker* v. *Carr*, 369 U.S. 186 (1962). Rather than following precedent or allow the state legislators to deny the voting rights of citizens, the Supreme Court redefined its authority and the "political questions" doctrine to relieve the gross malapportionment throughout the country. Since its decision in *Baker*, the Supreme Court institutionalized an ideology of political equality at the Congressional, state, and local level in *Wesberry v. Sanders,* 376 U.S. 1 (1964), *Reynolds* v. *Sims,* 377 U.S. 533 (1964), *Avery* v. *Midland County*, 390 U.S. 474 (1968). After a majority of the justices discovered that political equality alone would not provide relief, the Justice debated the extent to which the judiciary could determine political fairness, especially for political and racial minorities, in such cases as *Allen* v. *State Board of Education,* 393 U.S. 544 (1969), *Gaffney* v. *Cummings*, 412 U.S. 722 (1973), *Beer* v. *United States* 425 U.S. 130 (1976), *Gingles* v. *Thornburg* 478 U.S. 30 (1986), and *Davis* v. *Bandemer,* 478 U.S. 109 (1986). During this time, an ideological struggle between the Conservative and Liberal Justices resulted in a conflicted redistricting jurisprudence, especially in regards to the meaning of democracy and the development of political institutions. Finally, in addition to the contested meanings of democracy, the Justice on the Supreme Court debated the extent to which state legislators could develop districting plans on the basis of race and political interests, especially in regards to political equality, political fairness, and political

and racial reconciliation in *Shaw* v. *Reno* 509 U.S. 630 (1993), *Miller v. Johnson* 512 U.S. 997 (1995), and *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

Between 1910 and 2006, the Supreme Court heard oral arguments in 91 cases dealing with apportionment and districting. Throughout these decisions, the Justices on the Supreme Court negotiate competing visions of democracy that form the constitution of the democratic experience. The purpose of this work it to examine the role of the High Court in the redistricting process, especially in regards to how the public address of the Justices constitute the meaning of American democracy. By addressing reapportionment, the Supreme Court Justices provide the connection between "the nature of 'good speech' and the 'best regime," allowing for an examination between competing theories of judicial review and competing visions of democracy.[17] Building upon the connection between the discipline of public address and political theory, this work seeks to examine the meaning of American democracy through the development of the Supreme Court's reapportionment and redistricting decisions.[18] Since the Supreme Court possess the power

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[17] James Arnt Aune, "Public Address and Rhetorical Theory," *Texts in Context: Critical Dialogues on Significant Episodes in American Political Rhetoric*, (Davis: Harmagoras Press, 1989), 43 – 51.

[18] James Arnt Aune and Jennifer R. Mercieca, "A Vernacular Republican Rhetoric: William Manning's Key of Liberty," *Quarterly Journal of Speech* 92 (2005): 119 – 143. For addition work on the idea of republicanism, see James Jasinski, "Rhetoric and Judgment in the Constitutional Ratification Debates of 1787 – 1788: An Exploration in the Relationship between Theory and Critical Practice," *The Quarterly Journal of Speech* 78 (1992): 433 – 457; Zoltan Vajda, "John C. Calhoun's Republicanism Revisited," *Rhetoric and Public Affairs* 4.3 (2001): 433 – 457; Stephen Howard Browne, "'The Circle of Our Felicities: Thomas Jefferson's First Inaugural Address and the Rhetoric of Nationhood," *Rhetoric and Public Affairs* 5.3 (2002): 409 – 438, and, *Jefferson's Call for Nationhood*, (College Station: Texas A&M University Press, 2003); Michael William Pfau, "Time, Tropes, and Textuality: Reading Republicanism in Charles Sumner's 'Crime Against Kansas'" *Rhetoric and Public Affairs* 6.3 (2003): 385 – 414; M.N.S. Sellers, *American Republicanism, Roman Ideology in the United States Constitution,* (New York: New York University Press, 1994); Philip Petit, *Republicanism: A Theory of Freedom and Government,* (New York: Oxford University Press, 1997); and J.G.A.

to alter legal and political questions, in general, and representation and citizenship questions in particular, this dissertation seeks to explain how the Supreme Court reconstitutes the meaning of representation and, consequently, the meaning of democracy within its reapportionment and redistricting decisions.

Before examining the Supreme Court's constitution of American democracy, this chapter examines the theoretical background of this dissertation. First, the chapter reviews the literature on constitutive rhetoric and legal rhetoric to develop the ways in which language constitutes identity and community, generally, and the way in which the opinions by the Supreme Court creates authoritative texts shaping our legal discourse. Second, this chapter examines redistricting as a heresthetical device used to create a specific electoral result. Additionally, this chapter briefly reviews the literature to connect the implementation of redistricting on political deliberation. Finally, in this chapter, I preview the chapters forming the basis of this dissertation.

The Supreme Court, the Law, and Constitutive Rhetoric

In Federalist #78, Alexander Hamilton argued that the proposed Constitution would make the Supreme Court of the United States of America the "least dangerous branch" of the Republic since "it will be least in a capacity to annoy or to injure."[19] While the Executive "dispenses the honor" and holds the "sword of the community" and the

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Pocock, "Between Gog and Magog: The Republican Thesis and the Ideologia Americana," *Journal of the History of Ideas* 48 (1987): 325 – 246.

[19] Alexander Hamilton, "Federalist #78: The Judiciary Department" in *The Federalist* ed. William R. Brock (London: Phoenix Press, 2000), 398.

Legislative branch "commands the purse," and "proscribes the rules by which the duties and rights of every citizen are to be regulated," the Judiciary posses neither "the sword or the purse," nor will they "have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgment."[20] Yet, while Hamilton describes the Court as the "least dangerous branch"—a branch that can only become tyrannical if in concert with one of the other two and one that will most likely be overpowered by one of the other two— he assigns the Court two important roles within the government and American society. First, the Court would act as a guardian, keeping representatives "within the limits of their authority;" second, the Court would act as an interpreter since, "the interpretation of the laws is the proper and peculiar province of the courts. According to Hamilton, the judges must regard the constitution as fundamental law: "It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body."[21]

In the process of ascribing meaning to legislative acts and saying "what that law is," the Supreme Court creates its own authority and power to define the social world for the citizens and its government.[22] For better or for worse, the Supreme Court protected slavery and constituted African Americans as non-citizens, desegregated public schools and public

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[20] Alexander Hamilton, "Federalist #78: The Judiciary Department," 398 – 399.

[21] Alexander Hamilton, "Federalist #78: The Judiciary Department," 398 – 399.

[22] *Marbury* v. *Madison*, 1 U.S. 137, 177 (1803).

space, and consecrated a "right to privacy" and a "wall of separation."[23] When political bodies refused to act or chose not to act, such as in the desegregation cases, the Supreme Court answered and addressed some of the most important legal, political, and moral questions that faced the United States. To study legal argumentation is to study the legitimacy for judicial review, to examine the relationship between the Court, citizens, and the law, and to analyze how the political and legal actors constitute the social world around them—all of which is done through the judicial opinion. The judicial opinion, therefore, has two entailments. First, it is constitutive in the sense that it will create and reaffirm the social world for citizens. Second, it acts as the authority and justification for a legal decision.

The Law as Constitutive Rhetoric

The rhetorical study of law is the study of culture, community, identity, and authority. It encompasses not only what is legal or constitutional, but also what comprises "legality" or "constitutionality." The rhetorical study of the law searches for ways in which communities develop and disintegrate, regulate and relinquish ideas within competing communities. It seeks to understand how individuals and groups have the power to declare that an idea or practice is legal or illegal, constitutional or unconstitutional. In this sense, it is not only a study of forensic rhetoric but also of epidictic rhetoric. As Chaim Perelman and Lucy Olbrechts-Tyteca write in *The New Rhetoric*, the purpose of epideictic rhetoric is to gain adherence to "values held in common by the audience and the speaker.

[23] *Dred Scott* v. *Sandford*, 60 U.S. 393 (1856), *Brown* v. *Board of Education of Topeka*, 394 U.S. 294 (1955), *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Reynolds* v. *United States*, 98 U.S. 145 (1878), *Everson* v. *Board of Education* 330 U.S. 1 (1947).

The epidictic [sic] speech has an important part to play, for without such common values upon what foundation could deliberative and legal speeches rest?" [24] The rhetorical study of the law not only focuses on how a Courts resolve an issue, but how a Court recreates the ethos and values of a community. The rhetorical study of the law allows for the development of a language for the community by which citizens can address values and premises for the electoral practices necessary for a democracy.[25]

In the rhetorical study of the law, rhetoric is constitutive. According to James Boyd White, rhetoric is the "central art by which culture and community are established, maintained, and transformed. This kind of rhetoric . . . 'constitutive rhetoric' . . . has justice as its ultimate object."[26] For White, discourse calls communities into being. When

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[24] Chaim Perelman and L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, (Notre Dame: University of Notre Dame Press, 1969), 52 – 53.

[25] Karl Wallace, "Rhetoric and Politics," *The Southern Speech Journal* 20 (1955): 195 – 203 at 195.

[26] James Boyd White, "Rhetoric and Law: The Arts of Cultural and Communal Life," in *Heracles' Bow: Essays on Rhetoric and Poetics of the Law* (Madison: The University of Wisconsin, 1985), 28. Studies in constitutive rhetoric examine how communities develop together and in opposition to other identities. In "Constitutive Rhetoric: The Case of the Peuple Québécois," Maurice Charland examines the independence movement of French Canadians in Quebec to determine "how those in Quebec come to experience themselves as Québécois." In her analysis, Charland shows how the Québécois constituted themselves, and their opponents, by their discourse. See Maurice Charland, "Constitutive Rhetoric: The Case of the Peuple Québécois," *Quarterly Journal of Speech* 72.2 (1987): 133 – 150. In "Contested Collectives: The Struggle to Define the 'We' in the 1995 Quebec Referendum," Alissa Sklar examines the struggle between rhetorical communities in Quebec by focusing on a 1995 Separation Referendum. Building on the work of Charland, Sklar examines closely the discursive techniques that the Federalists and the Separatists used to constitute themselves and their position during the separation referendum; and, in addition, she pays close attention to the ways in which the Federalists and Separatists used each other dialectically. See Alissa Sklar, "Contested Collectives: the Struggle to Define the 'We' in the 1995 Québec Referendum." *Southern Journal of Communication*. 64.2 (1999): 106-122. In "Reinventing and Contesting Identities in Constitutive Discoursees: Between Diaspora and Its Others," Jolanta A. Drzewiecka examines how Dispora collectives constitute themselves in discourse, which aims to "legitimate certain forms of collective power and action in between national cultural formations." In terms of constitutive rhetoric, Drzewiecka wants to know how the collective "we" emerges as a "shifting formation as the identity of the dispora, its boarders, and who counts as its members," as the collectives position and contest each other, and then adapt and reposition themselves

individuals speak or when the Supreme Court releases decisions, the language of the Court constitutes individuals and communities, values and cultures. Yet this process is not forced onto individuals as individuals always posses the means by which they can use language to gain meaning or lose meaning, to constitute or reconstitute their identity, community, and culture. As White states, "To use language is always to change it, for one constantly makes new gestures and sentences of one's own, new patterns or combinations of meaning. Language is in part a system of invention, an organized way of making new meaning in new circumstances.[27] When using language, individuals ought to ask themselves who they want to be with their speech. He writes that he wants to ask each of us, "who we become, individually and collectively—who we can become—in our conversations with one another. What kind of selves, what kind of communities, do we establish with each other in our speech, especially in our persuasive speech?"[28] This type of rhetoric focuses on justice, ethics, and politics.[29]

With the view that the law is constitutive rhetoric, there are three main themes. First, human agents use communicative acts to create the law, which in turn creates a social universe whereby individuals possess authority and relationships to one another.[30] For

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in response to the other. See Jolanta A. Drzewiecka, "Reinventing and Contesting Identities in Constitutive Discourses: Between Diaspora and Its Others." *Communication Quarterly* 50 (2002): 1-24.

[27] James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language*, Character, and Community (Chicago: The University of Chicago Press, 1984), 8.

[28] James Boyd White, *Heracles' Bow,* 4.

[29] James Boyd White, "Cultural and Communal Life," *Heracles' Bow,* 28.

[30] James Boyd White, *Justice as Translation*, (Chicago: The University of Chicago Press, 1990), 96.

Kenneth Burke, a constitution provides agents with "substance" and "motives"; the Constitution of the United States preserves the "substance" and "motive" as it records traditional customs into law and allows agents to transform new customs into law.[31] Second, to understand this calculus of motives, individuals must understand the dialectical tension between the Constitution and its scene.[32] The constitution, the law, or a judicial opinion cannot be understood outside of the social context in which it occurs. In this sense, the constitution is dialectical in nature as it points to an external referent for comprehension. In this sense, the law is not just a system of rules but instead a series of consequences resulting from the values, beliefs, and faiths within a community.[33] Third, as human agents develop the law, there is no one sure-fire way to complete the communicative enactment of the law. Even though Supreme Court Justices write as if the

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[31] Kenneth Burke, *A Grammar of Motives*, (Berkeley: The University of California Press, 1969), 342. In the United States, the constitution creates a country for its citizens, three branches of government under the sovereign people, and provides each branch of government with roles to fulfill. Further, it creates limitations to those roles, or "Though Shalt Nots." Finally, while working under the roles of the Constitutional Wish, the members of the three branches of the government recreate the Constitution and the "substance" and "motive" of the American people. Acts of Congress, the President or the Courts reconstitutes the identity of the American people and their institutions. Especially concern for this project is the development of Constitutional Law, decisions from the Court that alter the American political body and alter the American Constitution even though it does not alter the Constitution.

[32]Kenneth Burke, *A Grammar of Motives*, 357. In *A Grammar of Motives*, Kenneth Burke posits that constitutional wishes or constitutional clauses refer to external sources for their meaning. First, Burke writes that Constitutions are agonistic instruments: "they involve an enemy, implicitly or explicitly." Second, Burke writes that as constitutions propound certain wishes or commands, they do so from one group of individuals to another and, overtime, the meaning behind these wishes change as the overriding situation or context changes. Third, constitutional wishes dialectically point to an external element in such a way that that one wish inside the constitution that mandates equality represents a situation outside of inequality outside of the constitution.

[33] Anthony G. Amsterdam and Jerome Bruner, *Minding the Law: How Courts Rely on Storytelling, and How Their Stories Change the Way We Understand the Law–and Ourselves*, (Cambridge: Harvard University Press, 2000), 6.

law commands them, the Justices choose their arguments. Further, they engage in a conversation with the two parties pleading their case and the other justices listening to the case, allowing them to be open to persuasion as they persuade one another.[34] In the deliberation about the law and the enactment of the law, voices compete; and, in the process, while one individual or community tries to persuade another, they must also be open to persuasion themselves. In addition, because of the competition and potential cooperation between the voices, a myriad number of worlds are possible as cultures collide and law develops. In a free society, the discussion of the law and the development of the community must occur; it can never be imposed on individuals.

To summarize, constitutive rhetoric involves the study of the development of the law through the development of identity and community. Through the rhetorical process, individuals and communities form and maintain their identities. As a result of the process, the individuals and communities invent the law. In this law, there is the development and maintenance of the social world. In this social world, individuals adapt the language of the community and choose their own role for the community. As the

[34] In "Cultural and Communal Life," James Boyd White writes that we "must accept the double fact that there are real and important differences between cultures and that one is in substantial part the product of one's own culture," (23,29). Further, he develops the rhetorical nature of the law as he states the law is a rhetorically activity where first, the lawyer must speak the language of his/her audience and, therefore is culture specific; second, there is a creative process to the law where the lawyer, judge, or citizen is always trying to change the law through an argumentative process, "to add or to drop a distinction, to admit a new voice, to claim anew source of authority;" and third, there is an ethical or communal character since every time a lawyer or judge speaks, he or she is establishing an ethical identity, or ethos, for oneself and one's audience. White writes that, "the lawyer's speech is thus always implicitly argumentative not only about the result—how should the case be decided?—and the language—in what terms should it be defined and talked about?—but about the rhetorical community of which one is at that moment a part." James Boyd White, "Cultural and Communal Life," *Heracles' Bow,* 33 – 34.

language adapts, so do the rules and regulations that maintain the community. One of the most important documents to the community is the judicial text that creates the terms of the society and the relations of society.

The Supreme Court: Defining the Social World through Communication

By interpreting a controversy and creating a judicial opinion, the Supreme Court plays a unique role in the United States as it constitutes the social and political realm in which legal discourse occurs. Through the observation and creation of the law, the Supreme Court performs a unique role that no other branch of government can fulfill: "the development, over time, of a self-reflective, self-correcting body of discourse that will bind its audience together by engaging them in a common language and a common set of practices. It is a claim to constitute a community and a culture."[35] While the other two branches of the federal government are by definition political in nature and in practice, and while the State governments are local and political, the Court offers the American people an impartial interpreter of the fundamental values in society that, in theory, binds all of society. Acting as the moral authority of "the people," the Court gives voice to communities, and in the process, both creates communities and allows them to recreate themselves.

In the judicial opinion, the Justices interpret and constitute the world around them with a specific cultural, legal, and political meaning. According to James Boyd White, the "activity of the law is the interpretation and composition of authoritative

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[35] James Boyd White, *When Words Lose Their Meaning*, 251.

texts."[36] At the heart of this activity is the judicial opinion, which serves as a "claim of meaning;" it describes a case, tells a story in a particular way, explains a result, connects the case with earlier cases, and connects the facts of one case with general concerns.[37] Further, the judicial opinion "engages in the central conversation that is for us the law . . . it makes two claims of authority: for the texts and judgments to which it appeals, and for the methods by which it works."[38] These texts will shape cultural ideals about citizenship, democracy, or the role of the courts in the political process.

First, the text of a judicial opinion grants authority to a specific decision and a specific vision of the social world. The decision by the majority or the plurality provides the social world with a legal language filled with set of rules and regulations, which invite a response by other social actors. The judicial opinion validates, authorizes, and creates an ethos for one form of life, one type of community, one kind of argumentation, one set of values of social goods, and one style of authority over another.[39] It serves as a rhetorical text and an authoritative text by which Justices resolve disputes and communicates their decisions and the entailments of its decision to the parties involved in the case, to the government, and to the public.[40] The opinion contains both *ratio decidendi*, the point in a

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[36] James Boyd White, *Justice as Translation*, 95.

[37] James Boyd White, *From Expectation to Experience: Essays on Law & Legal Education*, (Ann Arbor: The University of Michigan Press, 1999), 40.

[38] James Boyd White, *From Expectation to Experience*, 40.

[39] James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism*, 101.

[40] Sanford Levinson, "The Rhetoric of the Judicial Opinion," in *Law's Stories: Narrative and Rhetoric in the Law,* ed. Peter Brooks and Paul Gewirtz, (New Haven: Yale University Press, 1996), 187; Guyora Binder and

case that determines the judgment, and *obiter dicta*, "statements in opinions wherein courts indulged in generalities that had not actual bearing upon the issues involved," but may be used by courts in the development of future legal principles.[41] Further, these decisions are transcendent in that they provide a precedent for future cases that are not yet before the Court.[42]

Even dissenting decisions provide interpretive clues to the audience, especially in how to handle future controversies. According to John Hollander, "Dissenting opinions are more like moral essays, or theoretical analyses, or literary criticisms, than they are like effective instrumental opinions."[43] Furthermore, dissenting opinions show that the Court is fallible, through a public declamation.[44] This reading of the dissent diminishes the Court's legitimacy as being the final arbitrator of the Constitution at a point in time while it grants authority to a future Court to readdress these issues. While the majority's or plurality's decision seeks to gain authority, the dissenting opinion refuses to grant this

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Robert Weisberg, *Literary Criticisms of Law*, (Princeton: Princeton University Press, 2000), 293; Harry H. Wellington, *Interpreting the Constitution: The Supreme Court and the Process of Adjudication*, (New Haven: Yale University Press, 1990), 3.

[41] Don R. Le Duc, "'Free Speech' Decisions and the Legal Process: The Judicial Opinion in Context," *Quarterly Journal of Speech* 62 (1976): 279 – 280.

[42] Don R. Le Duc, "'Free Speech' Decisions and the Legal Process," 279; Peirre N. Leval, "Judicial Opinion as Literature," in *Law's Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz, (New Haven: Yale University Press, 1996), 207.

[43] John Hollander, "Legal Rhetoric," in *Law's Stories: Narrative and Rhetoric in the Law* ed. Peter Brooks & Paul Gewirtz, (New Haven: Yale University Press, 1996), 184.

[44] Lawrence Douglass, "Constitutional Discourse and Its Discontent: An Essay on the Rhetoric of Judicial Review," in *Rhetoric and The Law* ed. Austin Sarat and Thomas R. Kearns, (Ann Arbor: The University of Michigan Press, 1996), 259.

authority and offers a future Court the means by which precedent ought to be rejected. As Stanford Levinson asserts, "Whatever presumptions operate in favor of precedents, they are in fact refutable, which means that they can be overridden in the name of some other important value."[45]

In the process of granting one rhetorical vision over another, the Court establishes a sense of authority for that vision. This authority rests upon a sense of legitimacy, especially in terms of public acceptance. Judicial opinions are distinctive because they are not policy statements or political judgments from despotic rulers, "but judgments made by actors with limited authority, an authority that is governed by texts external to themselves to which they must look to determine both the proper scope of their power and the standards by which it is to be exercised."[46]According to legal scholar Philip Bobbitt, there is a necessary legal grammar by which the Supreme Court, lawyers, and the American people follow. What is important is that the Court "hears arguments, reads arguments, and ultimately must write arguments," and that through these arguments, the Court, lawyers, and the American people create legitimacy for the legal system in the United States.[47] The institutional legitimacy of the Court, according to Lawrence Douglass, develops through its "hermeneutic function: its task of constitutional exposition."[48]

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[45] Stanford Levinson, "The Rhetoric of the Judicial Opinion," 193.

[46] James Boyd White, *Justice as Translation*, 95.

[47] Philip Bobbitt, *Constitutional Fate: Theory of the Constitution*, (New York: Oxford University Press, 1992), 6 – 7.

[48] Lawrence Douglass, "Constitutional Discourse and Its Discontents," 231. Douglass, like Bobbitt, dissociates the justification for judicial review ("the adequacy or sufficiency of the reasons for believing

Douglass argues that perception of legitimacy remains if the Court remains faithful to offering readings of the written text.[49] James Boyd White offers a similar sentiment in regards to the authority of the Court, as well as the law or the church, when he states that authority is constituted in one's writing.[50] In addition, Robert A. Prentice examines the decision of *Brown v. Board of Education* to exemplify the rhetorical strategies inherent within a decision by the Supreme Court. For Prentice, the written decision for the court provides the legitimacy of the holding since, "if the opinion is to be truly effective, it must also persuade the Court's various audiences that the rationale is sound and, more importantly, that the results are in the best interest of the nation." [51] Furthermore, Prentice writes that the key for the legitimacy of the decision rests with how the author of the decision (and the authority of the Court) rests with how effectively the justice identifies with and responds to, "the most important exigencies to be resolved, adapts to the most important audiences, and copes with the most significant constraints."[52]

In the process of engaging in the activity of the law, the Supreme Court develops its own authority. The Supreme Court not only relies on its Constitutional power that "extends to all Cases, in Law and Equity, arising under the Constitution," it grants itself

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judicial review to be part of the original design of the Constitution,") and legitimation (the norms that guides the practice's invocation).

[49] Lawrence Douglass, "Constitutional Discourse and Its Discontents," 232.

[50] James Boyd White, *Acts of Hope: Creating Authority in Literature, Law, and Politics*, (Chicago: The University of Chicago Press, 1994), 276.

[51] Robert A. Prentice, "Supreme Court Rhetoric," *Arizona Law Review* 25, 1 (1983): 87.

[52] Robert A. Prentice, "Supreme Court Rhetoric," 102.

authority in its own opinion.[53] While the Court possesses the power "to say what the law is," the Court must proceed carefully as it renders a decision that adheres to Constitutional standards. In each aspect of the decision, whether it responds to the exigence, audience, constraints, or develops its own argument, the Supreme Court writes itself into a very peculiar and precarious position each time it places its words and decisions to place. With each case, the justices on the Court face multiple constraints of authority. Is the Court to defer its authority and decide not to rule on a case because it is not justiciable? Is the Court to live by its own Constitutional authority or should it adopt the authority of former Chief Justice John Marshall or any previous Court? Shall the Supreme Court respect the authority of *stare decisis* or shall it create a new precedent that will bind future Courts to the past where it will not reside? In addition to the decisions of the Court, each legal topos and each legal argument that the justices use in their translation of the case correlates to a *philosophical authority* that the Justices believe exists as a valid source of authority inside or outside of the constitution. For example, the "original intent" argument finds authority within the documents of constitutional composition and ratification: the Constitutional Convention Debates, the Ratification Debates in the States, the Federalist and Anti-Federalist Papers, and the private letters of the individual actors. The "textual" argument places its trust with the common and present day understanding of the text itself. The "structural" argument balances the competing authoritative positions of the Constitution. The "doctrinal" argument falls under the

[53] U.S. Const, Art. III. §2.

authority of precedent and Constitutional tests. The authority of the "prudential" argument rests with the judge or justice's ability to too rationally calculate the consequences of a legal issue. Finally, the "ethical" argument finds authority with the ethos of the American people within the Constitution.

For example, in the redistricting debate, the Justices lack a clear mandate from the historical record, which called for political equality while it denied people the right to vote,[54] or the text of the constitution, which allows for state discretion and calls for apportionment according to the number of inhabitants.[55] In the face of conflicting evidence, the Justices engage themselves in an interpretive debate as to which argument conforms best to the Supreme Court's role in the redistricting process. Should the Justices follow a prudential argument, knowing that the actions of the Supreme Court may threaten the stability of the political process? Conversely, should the Justice employ ethical arguments to fulfill the ideals of the American promise of democracy, political equality, and political fairness?

In addition to examining how a decision constitutes authority, the decision provides interpretative clues as to how justices examine a conflict in front of them. Within a decision, the rhetorical canons of invention, arrangement, and style play an important role in the development of the judicial opinion and the resolution of the case at hand. The Justices themselves are aware of their power and their ability to constitute the

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[54] See Chapter 4 and *Wesberry* v. *Sanders*, 376 U.S. 1 (1964).

[55] U.S. Const, Art. III. §2. U.S. Const, Amend XIV, §2.

world through words. Before Samuel Alito Jr.'s confirmation to the Supreme Court, Justice Stephen Breyer discussed, with a reporter, his fear of language:

> "I was frightened to death for the first three years....I was afraid I might inadvertently write something harmful," Justice Breyer said. "People read every word. Everything you do is important. There is a seriousness to every word, and you really can't go back. Precedent doesn't absolutely limit you. In almost every case, you're in a wide-open area. The breadth of that opening, getting up to speed on each case, constitutional law as a steady diet, the importance to the profession. ..." His voice trailed off, and he shook his head. "My goodness!" he exclaimed.[56]

Breyer is not the only Justice to share his views on the power of the decision. Consider Chief Justice Earl Warren's words in regards to the decision in *Brown* v. *Board of Education*: "the opinions [in Brown] should be short, readable by the lay public, non rhetorical, unemotional, and, above all, non-accusatory."[57] Furthermore, in the spirit of Warren's Brown decision, Joseph Goldstein argues that the decisions ought to be written for the primary audience of "We the People" since, the primary task of the Court is to "maintain the Constitution as something comprehensible to the People."[58]

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[56] Linda Greenhouse, "Court Veteran Remembers a Scary Start," *The New York Times,* 16 February 2006 accessed at: http://www.nytimes.com/2006/02/16/politics/politicsspecial1/16scotus.html?_r=1&oref=login.

[57] Quoted in Joseph Goldstein, *The Intelligible Constitution: The Supreme Court's Obligation to Maintain the Constitution as Something We, the People, Understand*, (New York: Oxford University Press, 1992), 58.

[58] Quoted in Joseph Goldstein, *The Intelligible Constitution*, 1992, 40 - 41.

The selection of the most important facts and the presence the justice provides for the facts in relation to the Constitutional wish shape the resolution to the case at hand. As Kenneth Burke suggests, the observations humans make are just implications of the particular terms a person uses: "In brief, much that we take as observations about 'reality' may be the spinning out of possibilities implicit in our particular choice of terms."[59] Social actors "know" a situation by "making indications to themselves. To indicate something is 'to extricate it from its setting, to hold it apart, to give it meaning, or, in Mead's language, to make it into an object.'"[60] Definitions, according to Perelman, can either be quasilogical or dissociative; they either bring one term in connection with another concept or separate a term by giving presence to the real meaning of the term.[61] In terms of the law, one commonplace about the Common Law is "treat like cases alike."[62] By doing this, the Supreme Court, as well as lower courts, provide regulatory stability for all citizens and other branches of government, and it provides an element of fairness and equal treatment.[63] Yet, in the process of deciding a case, the Court must, define the situation and then prioritize the facts of the particular case in relation to prior decisions, which developed from other particular facts. In this process, the Justices apply presence to certain

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[59] Kenneth Burke, "Terministic Screens," in *Language as Symbolic Action: Essays on Life, Literature, and Method*, (Berkeley: University of California Press, 1966), 46.

[60] J. Robert Cox, "Argument and the 'Definition of the Situation,'" *Central States Speech Journal* 32.3 (1981): 197 – 205.

[61] Chaim Perelam and Lucy Olbretchs-Tyteca, *The New Rhetoric*, 210 – 214, 444 – 450.

[62] Harry H. Wellington, *Interpreting the Constitution*, 12.

[63] Harry H. Wellington, *Interpreting the Constitution*, 12.

facts and to certain values in a case in relation to past facts and past values. The invention and arrangement process within a judicial decision will reflect the presence of the argument at hand.

In addition to the presence given to facts, the selection of terms and definitions will alter the perception and decision of a case. Rhetorical theorists have long advocated the study of definitional arguments in legal and public debate.[64] Definitional argument, according to Jeffrey St. John, is a mode of rhetorical inquiry that examines how rhetors wield "control, redirect, undermine, validate, support, qualify, or otherwise influence the development and suasiveness of specific arguments."[65] According to Brian R. McGee, studying definitional arguments serves an important role in the examination of the social

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[64] Cicero, Kenneth Burke, *A Grammar of Motives*, Kenneth Burke, *A Rhetoric of Motives*, Richard Weaver, The ethics of Rhetoric, Chaim Perelman and Lucy Olbrechts-Tyteca, *The New Rhetoric*, Edward Schiappa, "Arguing about Definitions," *Argumentation* 7 (1993): 403 – 417; Edward Schiappa, "Towards a Pragmatic Approach to Definition: 'Wetlands' and the Politics of Meaning," in *Environmental Pragmatism*, ed. Andrew Light an Eric Katz, (London: Routledge, 1996), 209 – 230; David Zarefsky, "Reagan's Safety Net for the Truly Needy: The Rhetorical Uses of Definition," *Central States Speech Journal* 35 (1984): 113 – 119; Brian R. McGee, "The Argument from Definition Revisited: Race and Definition in the Progressive Era," *Argumentation and Advocacy* 35.4 (1999): 141 – 158. Kenneth Broda-Bahm, "Finding Protection in Definitions: the Quest for Environmental Security," *Argumentation and Advocacy* 35.4 (1999): 159 -170; Scott B. Titsworth, "An Ideological Basis For Definition in Public Argument: A Case Study of the Individuals with Disabilities in Education Act," *Argumentation and Advocacy* 35.4 (1999): 171 – 184; Stephen P. Depoe, "'Qualitative Liberalism': Arthur Schlesinger, Jr. and the Persuasive Uses of Definition and History," *Communication Studies* 40.2 (1989): 81 –96; Kathryn M. Olson, "The Controversy Over President Reagan's Visit to Bitburg: Strategy of Definition and Redefinition," *Quarterly Journal of Speech* 75 (1985):129 – 151; For Schiappa, the argument from definition is when a rhetor tries to find a better definition in a context that will help resolve a dispute; an argument by definition is the use of argument based on well-established definitions. In addition, Perelman offers four types of definitions in *The New Rhetoric*: (1) the normative definition, which indicates "the manner in which a word is to be used;" (2) the descriptive definition, which indicates "what meaning is given to a word in a certain environment at a particular time;" (3) condensed definitions, which "point out the essential elements of a descriptive definition;" and, (4) complex definition, "which combine, in various ways, elements of the other three types," (210 –211).

[65] Jeffrey St. John, "Matters of Public Concern: Reconceptializing Public Employee Free Speech through Definitional Argument," *Rhetoric and Public Affairs* 6.2 (2003): 261 – 284.

world and to discursive or rhetorical communities in which the definitions are commonplace.[66] Furthermore, the use of one definition does not exclude other definitions; for example, seeing the "law as rhetoric," does not necessarily exclude the trope "the law as power" or the "law as fiction." These definitions depends on the circumstances in which a rhetor uses the term, which will be very apt in terms of the Court's use of a "political question."[67] There are many forms of arguments by definition or argument from definition. For Schiappa, the argument from definition is when a rhetor tries to find a better definition in a context that will help resolve a dispute; an argument by definition is the use of argument based on well-established definitions. As Steve Schwarze demonstrates, judicial opinions rely on two types of arguments, definitional arguments and institutional arguments; furthermore, justices often employ definitional arguments in their opinions that rely on institutional authority.[68] As J.M. Balkin suggests, the study of topics, or commonplaces, is the study of social practices of argumentation and this, "the study of a shared form of social life." [69] To study how communities use certain topics is not enough. Balkin suggests, "To be critical about legal topics, we need to play

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[66] Brian R. McGee, "The Argument from Definition Revisited," 141 – 158.

[67] L.H. LaRue, *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority*, (University Park: The Pennsylvania State University Press, 1995), 11.

[68] Steve Schwarze, "Rhetorical traction: Definitions and Institutional Arguments in Judicial Opinions about Wilderness Access," *Argumentation & Advocacy*. 38.3 (2002): 131-150; See also Erik Doxtader, "Learning Public Deliberation Through the Critique of Institutional Argument." *Argumentation and Advocacy* 31.4 (1995): 185-203 for how institutions develop arguments over the "public good."

[69] J.M. Balkin, "A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason," in *Law's Stories: Narrative and Rhetoric in the Law,* ed. Peter Brooks and Paul Gewitz, (New Haven: Yale University Press, 1996), 221.

various topical approaches off against each other; for example, we might play off the language of efficiency and transaction cost reduction against the language of moral responsibility and desert. That is because we can often see the limitation of topics by means of other topics that we bring to bear."[70]

In addition to the invention and arrangement process, style plays an important role. Majority or plurality decisions require impartiality, especially in terms of maintaining the authority of the Court through legitimacy. To avoid any perception of an arbitrary decision, according to Robert Ferguson, the judge must write as if the resolution is an inevitable conclusion and the judge lacks freedom of choice in the process of reaching a decision.[71] As with the decision in *Brown*, the holding should be clear and understandable. However, while the holding of the Court may require simplicity, the dicta and dissent require eloquence and, certainly, amplification. According to Ron R. Le Duc, a general rule of opinions is that "the more vigorous the passage being quoted, the less likely it is to be an expression of existing law."[72] By adding amplification to either dicta or to a dissenting opinion, the justice seeks to persuade a future court with more force, even if it

[70] J.M. Balkin, "A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason," 221.

[71] Sanford Levinson, "The Rhetoric of the Judicial Opinion," 189.

[72] Don R. Le Duc, "'Free Speech" Decisions and the Legal Process: The Judicial Opinion in Context," 279 – 280.

offers nothing to the holding, especially in regards to a clear understanding of the question under debate.[73]

By engaging in the law, the Supreme Court creates a text that will provide form and meaning to the community. The Supreme Court uses the judicial opinion to create authority for a specific social world and to grant authority to a way to create this world. This text of constitutional or common law, will serve as a set of rules and regulations for the people and for future courts to follow. The Courts constitution these decisions through argumentation and provide audiences with reasons as to why it modified or did not modify an exigence.

Constituting Democracy: Representation as a Communicative Act

The ratification of the Constitution of the United States of America initiated a new era of representation in world politics. The experiment of the American Constitution altered the participatory nature of the republican form of government. No longer were the people to be subject to the divine rule of kings, nor the imperial right of parliament. Instead, the government would be subjected to "We the People," a vast and unknown sovereign. The goal of the new republic would be to "guard the society against the oppression of its rulers," and "guard one part of society against the injustice of the other

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[73] Pierre N. Leval, "Judicial Opinion as Literature," 209. In his essay, Leval states that Justice Oliver Wendall Holmes Jr.'s comment that the "Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statistics*," only detracts from the question as to whether or not a statute regulating hours of labor was consistent with due process.

part."[74] In order to accomplish this goal, elections would provide a necessary check against governmental tyranny.

After the ratification of the Constitution, the people would engage in the democratic experience through the ability to choose their representatives. According to *The Federalists Papers*, elections were the fundamental characteristic of representation, and representation was the fundamental characteristic of the republic.[75] Rather than rely on a form of direct democracy, the republic would demand representatives "assemble and administer" government for the people throughout the country; the republic would feature representatives who would provide a "substitute for a meeting of the citizens in person." [76]In Federalist #57, Madison argues that in order for the Republic to succeed, the people would need to select rulers who would, possess the "most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust." [77]

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[74] James Madison, "Federalist #51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments," 267.

[75] Jean Yarbrough, "Representation and Republicanism: Two Views," *Publius: The Journal of Federalism* 9.2 (1979): *89*.

[76] James Madison, "Federalist #14: Objections to the Proposed Constitution From Extent of Territory Answered," 62.

[77] James Madison, "Federalist #57: The Alleged Tendency of the New Plan to Elevate the Few at the Expense of the Many Considered in Connection with Representation," 293; James Madison, "Federalist #53: The House of Representatives (continued)," 271.

In order for the elections to work properly, certain institutional factors would be necessary to ensure the health and vitality of the republic. First, to ensure the responsibility and quality of the representative and, hence, representation, the people would need to limit the term of appointments.[78] Second, while the representatives would refine the opinions of the people, representatives need to possess common interests with the people; they need "immediate dependence on, and an intimate sympathy with, the people."[79] Third, since the House of Representatives would be the branch of government devoted to the people and would control the "purse" of the country, it would be necessary to create a system of legislative supremacy to ensure a government of the people; however, a system of checks and balances between branches would be required to provide a remedy for unchecked power.[80] Fourth, the safety of the republic and the control of the republic by the people would develop through short-legislative appointments and frequent elections, which would reinforce the dependence of the representative to his/her constituency.[81] Frequent elections would provide relief for tyranny and accountability. Even though a politician may possess ambition, the electoral process would check that

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[78] James Madison, "Federalist #57: The Alleged Tendency of the New Plan to Elevate the Few at the Expense of the Many Considered in Connection with Representation," 293; James Madison, "Federalist #53: The House of Representatives (continued)," 271."

[79] James Madison, "Federalist #53: The House of Representatives (continued)," 271."

[80] James Madison, "Federalist #51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments," 266 – 268.

[81] James Madison, "Federalist #37: Concerning the Difficulties of the Convention in Devising a Proper Form of Government," 179. See also James Madison, "Federalist #57: The Alleged Tendency of the New Plan to Elevate the Few at the Expense of the Many Considered in Connection with Representation," 294.

ambition and force him/her to respond to the public. Fifth, to control factions, the republic would need to be large in scope, which would create competition by increasing the number of interests in society, increasing the number of voters of society, and increasing the number of enlightened and impartial statesmen in society.[82] According to Madison, large electoral districts were ideal because they would produce the most refined representative who would listen, reflect, and pursue the diverse opinions in the district, and they aid rational discourse in that there will be few representatives deliberating, causing reason to prevail over passion.[83]

While this discussion focuses on the importance of representation to the health of the democratic experience, it fails to consider the ways in which electoral design can strategically manipulate the democratic experience. Jean Yarbrough writes that, according to the Federalists, representatives were to possess no distinct interests in society, depending on the quality of their representation to ensure reelection and employment.[84] Yet, representatives found ways to secure employment without depending on the votes of the people by manipulating the lines of electoral districts to ensure a favorable constituency. By having the elected select the electors, the basic system of self-government becomes a system of unrepresentative-government as the elected seek to fulfill their wishes rather than the wishes of those in their districts.

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[82] James Madison, "Federalist #10: The Utility of the Union as a Safeguard against Domestic Faction and Insurrection (continued)," 46.

[83] Jean Yarbrough, "Thoughts on the Federalist's View of Representation," *Polity* 12.1 (1979): 72.

[84] Jean Yarbrough, "Thoughts on the Federalist's View of Representation," 78.

As a process, redistricting emerges similarly to William H. Riker's concept of heresthetics. In redistricting, the ability to "define the situation" or "define the district" serves as a way in which those in control of the redistricting process attempt to create the most desirable result by ensuring that the terms of an election will be the terms that the majority of the people accept.[85] Rather than risk an election in a competitive district, redistricting plans attempt to maximize safe districts while minimizing competitive or oppositional districts. By relying on the perceived social wisdom within a community and strategically placing voters within a district, elected officials decrease a candidate's need to persuade voters to support causes and diminishes potential debate with political opponents over controversial issues affecting the lives of citizens.

Done well, at least through the eyes' of politicians, a good redistricting map represents an argumentative fallacy within a political institution whereby the lines on a map diminish, if not cut-off, the need for citizens to engage one another in debate over the direction of the community since the winner of an electoral decision is known by the citizens and the political parties before the election. Though citizens still vote, the chance that the vote, especially favoring a candidate expected to lose, possesses meaning to swing an election decreases in a gerrymandered district. While the terms of any election will be fought over the beliefs and communal wisdom of the majority within a district, the effect of a political debate between political factions decreases and the ability of the losing

[85] For a discussion of heresthetics, see William H. Riker, *The Strategy of Rhetoric: Campaigning for the American Constitution*, (New Haven: Yale University Press, 1996), 9. According to Riker, heresthetic concerns, "choosing and deciding… the art of setting up situations—composing the alternatives among which political actors must choose— in such a way that even those who do not wish to do so are compelled by the structure of the situation to supporter the heresthetician's purpose," (9).

citizens to elect a candidate of choice deceases as well. With a well-planned redistricting map, elections, and the debate thought necessary to develop a beneficial electoral process in our constitutional republic, diminishes the necessity of some elections though not all redistricting plans will be completely successful.

Representation and Communication: Redistricting as a Heresthetical Strategy

In terms of heresthetics, redistricting is a communicative strategy through which state legislators seek to alter representation at the local, state, and, possibly, national level if one party can win enough states. The purpose of redistricting is twofold: first, representatives and political parties desire to gain the maximum amount of security for politicians and parties by establishing safe districts; second, legislators create redistricting plans to gain the maximum amount of seats in a state.[86] Of course, in the redistricting process, these may be competing goals. As legislators devise plans to gain additional seats in a state, they risk the total number of safe seats and, consequently, the legislators may develop competitive races. Furthermore, to achieve the maximum amount of security for a party, the party must control the state legislature and the governor's office. If one party controls both the House and the governorship, then that party will benefit as it sees fit; if one party controls the House but faces a governor's veto, then the party will need to compromise with the other party.[87] Furthermore, the incumbents may benefit more from

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[86] Scott W. Desposato and John Petrocik, "The Variable Incumbency Advantage: New Voters, Redistricting, and the Personal Vote," *American Journal of Political Science* 47.1 (2003): 18 – 32.

[87] David Butler and Bruce Cain, *Congressional Redistricting: Comparative and Theoretical Perspectives*, (New York: Macmillion Publishing Group, 1992), 2.

a partisan bias, or single party control over the redistricting process, rather than a bi-partisan bias.[88] If two parties create a bi-party redistricting plan, then the goal of the plan is to protect incumbents for both parties. This will reduce the total number of competitive races in the state as well as diminish the number of new seats anyone party can pick up. Additionally, studies suggest that the partisan construction of the Court will alter whether or not redistricting plans are constitutional or unconstitutional.[89]

While the purpose of a redistricting plan seems straightforward, the consequences, especially in regards to political deliberation, are anything but straightforward. First, the redistricting process may create an "eye for an eye" political strategy for all political issues and future redistricting plans, weakening the trust necessary for deliberation.[90] In the process of redistricting, legislative activity may stop while legislators compromise about neighborhood boundaries; if the major parties are feuding over boundary lines, then the parties may poison the political well for all political issues or for future acts of redistricting whereby one party seeks revenge on another.[91] For example, in the Texas redistricting plan

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[88] Michael Lyons and Peter F. Galderisis, "Incumbency, Reapportionment, and U.S. House Redistricting," *Political Research Quarterly* 48.4 (1995): 857 – 871; Bruce E. Cain, "Assessing the Partisan Effects of Redistricting," *The American Political Science Review* 79.2 (1985): 320 – 333; Bruce E. Cain and Janet Campagna, "Predicting Partisan Redistricting Disputes," *Legislative Studies Quarterly* 12.2 (1987): 265 – 274. In addition to single party control, the authors also discuss the nature of the voting rule (such as majority rule or two-thirds vote when voting on the redistricting plan) and political competitiveness of the state legislature as other factors that alter partisan redistricting.

[89] Gary W. Cox and Jonathan N. Katz, *Elbridge Gerry's Salamander: The Electoral Consequence of the Reapportionment Revolution*, (New York: Cambridge University Press, 2002), 66.

[90] For a discussion on trust and deliberation, see Gerard A. Hauser and Chantal Benoit-Barne, "Reflections on Rhetoric, Deliberative Democracy, Civil Society and Trust," *Rhetoric and Public Affairs* 5.2 (2002): 261-275.

[91] David Butler and Bruce Cain, *Congressional Redistricting,* 3.

of 2003, Republicans argued that they were only doing to the Democrats what the Democrats did to the Republicans in the 1990's. The Republicans argued that when the Democrats possessed control of the redistricting process in the 1990's, the Democrats created district lines to entrench their power even though they were not the dominant power in the state.

Second, state legislators attempt to employ a districting plan to develop deliberative legitimacy by creating an apparent "natural" majority. By redrawing the lines, a political group can maximize its power at the state and federal level, even if the party creates artificial majorities that may not reflect the demographics of the population, as was the case in the "original" gerrymandering of Massachusetts back in 1812 when the Federalists polled 51,766 and the Democrats polled 50,164, resulting in an outcome of twenty-nine Democrats representatives and eleven Federalists representative in the state senate.[92] In the 1990 redistricting in Texas, Republicans argued the Democrats were no longer the majority party and did not deserve the amount of seats they redrew for themselves. Here the Democrats entrenched themselves into power while not reflecting the "will of the people." This argument assumes that a "majority" is discernable, it possesses similar interests, and it is shut out of the political process. Furthermore, it neglects the individual characteristics of candidates and issues, and neglects other contextual factors such as money or scandals.

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[92] David L. Anderson, "When Restraint Requires Activism: Partisan Gerrymandering and the Status Quo Ante," *Stanford Law Review* 42.6 (1990): 1550.

Third, redistricting threatens democratic accountability and diminishes deliberative means to achieve accountability. One alarming trends in elections is incumbent retention. Currently, over 98% over incumbents retain their seats in Congress, which may defy James Madison's belief that frequent elections would ensure that the House of Representatives would share the interests of the people and that the House would be the "numerous and changeable body."[93] While this country still holds frequent elections, it remains to be seen if politicians still share the same interests with the American people since they reside in "safe districts" of their choosing. When politicians create "safe" districts, they weaken competition in a state and develop an incumbency advantage.[94] These safe districts may threaten a core tenet of democratic legitimacy, "accountability to shifting voter preference," since legislators reduce the competitiveness of elections, which reduces the accountability politicians, have to voters.[95] Furthermore, if a lack of competition exists, the representatives may no longer be accountable to the

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[93] James Madison, "Federalist #52: The House of Representatives," 271; James Madison, "Federalist #63," 323.

[94] The evidence for this seems mixed. See David Butler and Bruce Cain, Congressional Redistricting: Comparative and Theoretical Perspectives, (New York: Macmillian Publishing Company, 1992), 5. Edward Tuft, "Determinants of the Outcome of Mid-Term Congressional Elections, *American Political Science Review* 69. (1975): 816-826; John A. Frejohn, "On the Decline of Competitive Congressional Elections," *American Political Science Review* 7 (1977): 166 – 176; Gary King, "Representation through Legislative Redistricting: A Stochastic Model," *American Journal of Political Science* 33 (1988): 787-824; Charles Bullock III, "Redistricting and Congressional Stability," *Journal of Politics* 37.2 (1975): 569–575; J. David Gopoian and Darrell M. West, "Trading Security for Seats: Strategic Considerations in the Redistricting Process," *The Journal of Politics* 46.1 (1984): 1080 – 1096; Linda Fowler, Scott Douglass, and Wesley Clark Jr., "The Electoral Effects of House Committee Assignments," *Journal of Politics* 42.1 (1980): 307– 319; Larry Schwap, "Reapportionment, Redistricting, and Reelection of Incumbents to the House of Representatives," 1983.

[95] Samuel Issacharoff, "Gerrymandering and Political Cartels," *Harvard Law Review* 116.2 (2002): 600.

people but rather to the special interests groups and lobbyists; as a result.[96] Furthermore, if one party controls the redistricting process and possesses enough votes locally and nationally, then there is no need for party cooperation or compromise.[97]

Fourth, redistricting may lead to the under-representation of ethnic minorities, which diminishes the effectiveness of the political process and excludes voices from the political process.[98] Ethnic groups closely examine the census figures to ensure that they receive fair representation according to their size of population. Since most non-white immigrants tend to live in overcrowded urban areas where census workers may not be able to gauge accurately the size of the population accurately, certain ethnic groups may receive less representation. Furthermore, redistricting plans may not be proportional to the population of the State. If a proportional representation system were adopted, then constituencies that would lose election in a single-member district based on a geographical system of voting would gain voice and representation.[99] Because they possess the ability to

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[96] Peter Beinart, "Golden" *The New Republic* 24 January 2005; Janet C. Campagna, "Bias and Responsiveness in the Seat-Vote Relationship," Legislative Studies Quarterly 16.1 (1991): 82; Michael J. Klarman, "Majoritarian Judicial Review: The Entrenchment Problem," *Georgetown Law Review* 85 (1997): 495.

[97] Jeffrey Toobin, "The Great Election Grab," *The New Yorker,* 8 December 2003 http://www.newyorker.com/fact/content/?031208fa_fact.

[98] David Butler and Bruce Cain, *Congressional Redistricting,* 13. See also See Lani Guinier, "The Triumph of Tekenism: The Voting Rights Act and the Theory of Black Electoral Success," *Michigan Law Review* 89 (1991): 1077 – 1154; Lani Guinier, "No Two Seats: The Elusive Quest for Political Equality," *Virginia Law Review* 77 (1993): 1413 - 1514; Lani Guinier, "The Representation of Minority Interests: The Question of Single-Member Districts," *Cardozo Law Review* 14 (1993): 1135 – 1174. Lani Guinier, "Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes," *Texas Law Review* 71 (1993): 1589 – 1642.

[99] Mark E. Rush, *Does Redistricting Make a Difference? Partisan Representation and Electoral Behavior,* (Boston: Lexington Books, 2000), 131.

create geographical districts in an arbitrary fashion, state legislators can divide and submerge the voice of political minorities, diminishing the full range of democracy. Consequently, if minorities do not possess a legislative voice, they will be unable to persuade the legislators to adopt necessary political reforms they desire because the voices of the political majority will drawn out the political minority.

Fifth, redistricting practices alters the quantity and quality of voices in public deliberation. Redistricting may lead to the decrease in voter turnout since voters will not vote if their votes will not count. In addition, since there are fewer competitive seats then the focus of the race turns from election day to primary day, and as a result, there is the election of candidates who are more extreme in their views. According to Representative Jim Leach, (R-IA), "In House politics, if your district is solidly one party, your only challenge is from within that party, so you have every incentive for staying to the more extreme side of your party. If you are a Republican in an all-Republican district, there is no reason to move to the center. You want to protect your base."[100] Primaries are a means by which ideologically driven voters choose who will run for office and sit in the "safe district." However, only a few eligible voters participate in this process. Since the candidate that runs for a safe-seat does not need to possess a wide-spread appeal among all voters, the candidates can continue to show the characteristics that allowed him/her to win the primary, and have no responsibility to voters in the district that do not share the interests of the primary voters.

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[100] Jeffrey Toobin, "The Great Election Grab," http://www.newyorker.com/fact/content/?031208fa_fact.

Of course, while some scholars argue that the consequences to the redistricting process threaten democracy accountability and the republic, competing studies show that the redistricting process is not as powerful as critics suggest as other contextual factors prevent the desired outcome of a redistricting plan. First of all, in the process of creating "safe districts," politicians may thin out their advantage and create potentially competitive seats. According to Bruce E. Cain, when planning a redistricting, a party must examine the number of seats it possesses and the number of seats it thinks it can achieve without hurting the party in the future; the advancement of one representative in the state may ultimately hurt the party.[101] In this sense, redistricting is a self-regulating or self-limiting enterprise by which a party can only gain so much of an advantage. Of course, Cain's work appears before the widespread introduction of technology that enables politicians to redistrict with pinpoint accuracy. According to Nathanial Persily, computer software allows representatives to use census data along with data such as party registration, voting patterns, property-tax records, roads, railways, and old-district lines to create districts that will still follow Supreme Court rules in redistricting; now, the technological means makes partisan redistricting too powerful and diminished the self-regulating aspects of redistricting.[102]

Second, and closely related, a partisan bias may develop as parties try to strengthen their position and incumbency with a state. However, the advantage a party tries to

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[101] Bruce E. Cain, *The Reapportionment Puzzle*, (Berkeley: The University of California Press, 1984), 151 – 159.

[102] Jeffrey Toobin, "The Great Election Grab," http://www.newyorker.com/fact/content/?031208fa_fact.

achieve in a state rests on multiple factors, such as control of the state legislature, control of the governorship, which possesses the power to veto a plan if the governor is not a member of the party, political compromises in the redistricting process, court involvement in the plan, court-ordered redistricting tests, and the voter's allegiance to incumbents.[103] In effect, any one redistricting plan will not have effect nationally. In order for national politics to alter, multiple redistricting plans need to occur in the favor one party and those challenges must stand up against judicial scrutiny. While one party may redistrict in a state and gain power for that party locally, the party may not be able to win control nationally.[104]

Third, the long-tem consequences of redistricting are uncertain. For a powerful gerrymander to occur, voters need to act in a predictable manner that would almost violate their agency as voters. Since party identification is not as high as it once was, it may be hard to predict whether a change in district lines will lead to a change in partisan composition.[105] In addition to the Court rules that legislators must follow in the redistricting process, state legislators must create a plan leading to the "greater haul of seats" and voters must then behave at the polls according to that plan, regardless of the

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[103] Harry Basehart and John Comer, "Partisan and Incumbent Effects in State Legislative Redistricting," *Legislative Studies Quarterly* XVI (1991): 65 – 79; See also Richard Born, "Partisan Intentions and Election Day Realities in the Congressional Redistricting Process, "*American Political Science Review* 70 (1985): 305 – 19.

[104] Janet Campagna and Bernard Grofman, "Party Control and Partisan Bias in 1980s Congressional Redistricting," *The Journal of Politics* 52.4 (1990): 1242 – 1257.

[105] David Butler and Bruce Cain, *Congressional Redistricting,* 5.

quality of the candidates whom are running.[106] Of course, as States face population changes and as parties face political corruption, then these plans may not yield the expected outcomes. For example, during the 1970's, Republicans in New York redistricted the state to try to gain control of the State. However, the Republicans received partisan backlash after President Richard Nixon's Watergate scandal and, as a result, the Democrats gained back control of both Houses in the State of New York.[107]

Fourth, scholars question whether or not redistricting makes a difference either at the local or national level. Redistricting may make a difference depending on the election examined, the state or district examined, whether or not state returns should be examined according to national returns, and the terms used in the analysis. For example, in Peverill Squires' studies of redistricting plans during the 1970's, Squire finds that parties that controlled the redistricting process won 74% of the election seats whose districts' lines were drawn to achieve an advantage; however, the "advantaged parties did not gain more seats than they held before redistricting nor win more than the percentage of seats to which the vote would entitle them. Any advantages to these parties appear to have been washed out over the 10 years examined."[108] This study is similar to others that show that partisan control of a redistricting process tends to wash out over the during of the

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[106] Richard Born, "Partisan Intentions and Election Day Realities in the Congressional Redistricting Process," 306.

[107] David Butler and Bruce Cain, *Congressional Redistricting*,10.

[108] Peverill Squire, "Results of Partisan Redistricting in Seven U.S. States during the 1970s," *Legislative Studies Quarterly* 10.2 (1985): 259 – 266. The seven states examined were Alabama, Arizona, Colorado, Florida, Iowa, New York, and Tennessee.

redistricting plan and that the partisan control of redistricting may not lead to congressional control of districts.[109]

Fifth, according to Mark E. Rush, redistricting, especially partisan redistricting, does not make a difference. First of all, Rush argues that previous studies on redistricting are flawed since they are riddled with internal contradictions and inconsistencies that are nurtured by the flaws in the prevailing paradigm of political science analysis."[110] Second, Rush argues that determining political gerrymandering is difficult since denial of partisan representation needs an identifiable group with discernible interests; however, this identifiable group is difficult to define when party affiliation is not always clear, when party affiliation is on the decline and when staunch party constituencies, in neighborhoods, states, or towns may not exist.[111] Furthermore, other factors may be involved in the election process, such as candidate funding or candidate desirability. Similarly, lost in the debate over redistricting are other factors which would determine races such as returns from the national elections, scandals with politicians (either in the white house or with the party), the quality of the candidate, the state of the economy,

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[109] Peverill Squire, "Results of Partisan Redistricting in Seven U.S. States During the 1970s," 264; See also Robert Erikson, "Malapportionment, Gerrymandering, and Party Fortunes in Congressional Elections," *American Political Science Review* 66 (1972): 1234 – 1245; David Mayhew, "Congressional Representation: Theory and Practice in Drawing the Districts," in *Reapportionment in the 1970's,* ed. Nelson W. Polsby, (Berkeley: University of California Press, 1971), 249- 290; Howard Scarrow "The Impact of Reapportionment on Party Representation in the State of New York," in *Representation and Redistricting Issues* ed. Arend Liphardt, Robert B. McKay, and Howard A. Scarrow, (Lexington: Health, 1982): 223 – 238.

[110] Mark E. Rush, *Does Redistricting Make a Difference?* 126.

[111] Mark E. Rush, *Does Redistricting Make a Difference?* 126.

issues of the election, and the individual preference of party and candidate.[112] Rush claims that partisan redistricting claims may be viable if the following conditions are ascertainable: (1) there is an identifiable party cohesion in a given area; (2) the group is cohesive and the "group's size and representational entitlement are measurable;" and (3) "the voters are party voters. That is, a Democratic vote in one district will be a Democratic vote in another, regardless of the candidates, and party votes in one part of a state are equitable with party votes in other parts."[113] However, as of now, measures of partisan fairness by measuring seats-vote ration and swing ratios are "grounded on inaccurate assumptions about partisan behavior and are, therefore, of little practical use."[114]

Finally, redistricting may lead to representational responsiveness as incumbents try to both retain their seats and increase party support, meaning incumbents will lose some security in order to gain party dominance.[115] In the first election after redistricting, there is a great deal of uncertainty. With this uncertainty, representatives try to maximize their advantage as they create districts with smaller likely victory margins.[116] In order to seek out votes, politicians will need to reach out to new voters in these districts, especially to voters

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[112] Scott W. Desposato and John Petrocik, "The Variable Incumbency Advantage: Mew Voters, Redistricting, and the Personal Vote," 19.

[113] Mark E. Rush, *Does Redistricting Make a Difference?* 127 – 128.

[114] Mark E. Rush, *Does Redistricting Make a Difference?* 127 – 128.

[115] Andrew Gelman and Gary King, "Enhancing Democracy through Legislative Redistricting," *American Political Science Review* 88.3 (1994): 541 – 559. According to Andrew Gelman and Gary King electoral responsiveness is electoral defined as the "degree to which the partisan composition of the legislature responds to changes in voter preference," or, "the change in the expected seat proportion given a small change in the vote proportion."

[116] Andrew Gelman and Gary King, "Enhancing Democracy through Legislative Redistricting," 542-543.

who voted for other representatives in the past or to voters that voted for politicians in another party. As the margins of victory become smaller and smaller, candidates will need to be responsive to the people and the needs of the people to ensure election.

The literature on redistricting suggests that, as a heresthetical strategy, redistricting attempts to procure a specific electoral result though the attempt may not always lead to the desired result. The attempt, and especially the success, of districting alters the way in which citizens engage in public deliberation and experience democracy. While some scholars argue that the effects of redistricting are not as severe and disappear over time, the volume of research, as well as evidence from the Supreme Court decisions, suggest there are dire consequences at stake, especially in regards to the constitution of the democratic experience.

Visions of Democracy: The Supreme Court, Constitutive Rhetoric and the Reapportionment Puzzle

Constitutive rhetoric focuses on the moments of historical crisis. In times of crisis, as James Boyd White suggests, words lose their meaning. When this occurs, individual actors reshape the lost view of language in light of the historical crisis to develop a new language, which in turn, develops a new conception of the social world. In terms of the Supreme Court and representation, the judiciary faces a historical crisis of the meaning of representation and democracy, hears oral arguments, and responds by writing judicial opinions, which reconciles older and newer meanings of representation and democracy.[117]

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[117] James Boyd White, *When Words Lose Their Meaning*, 3 – 4.

Since the Supreme Court's initial refusal to decide a reapportionment case in *Richardson* v. *McChessney*, 218 U.S. 487 (1910) to its most recent decision in *L.U.P.A.C.*, the Justices on the Supreme Court have possessed the ability to decide whether or not to rule on an apportionment or redistricting case, who does or does not possess the ability to challenges cases, whose vote should or should not count in an election, whether or not an elections should adhere to political equality and political fairness, whether or not the states possess the discretionary ability to limit the representation of the people, and to what degree partisan or racial characteristics can dominate the apportionment and districting process. The balance of these questions concerns the meaning of the democratic experience and, since the Supreme Court's decision in *Richardson*, the Justices have been able to shape the meaning of this democratic experience.

The history of voting in the United States concerns the political struggle to contract and expand the right to vote for citizens in society. The Supreme Court's voting rights jurisprudence is no different. The Supreme Court's decisions in the reapportionment and redistricting cases concern the constitution, and the negotiation, of the meaning of the democratic experience for the American polity. From a communicative standpoint, the act of constituting democracy is important to study for two reasons. First, the dissertation explores the linguistic constitution of democracy through the Supreme Court's decisions. In the apportionment and districting decisions, the Justices on the Supreme Court debate the meaning of democracy through their own ideological perspective, which alters the way in which citizens can participate in self-government. This

dissertation examines how the justice intellectual grapple with the meaning of democracy and attempt to persuade others that their view is the best vision for the American people. Second, this dissertation examines the ways in which political institutions, such as electoral districts, state legislators, political parties, and the Supreme Court, enhance and constrain the way in which citizens can engage in political deliberation. Throughout the apportionment and districting decisions, the Justices on the Supreme Court invented its own authority to expand the electorate or allow the state legislators to employ rationality to pursue legitimate interests. Consequently, the discretion of the Supreme Court justices allow for the development of a constitutional republic or a constitutional democracy, legislative discretion or political equality, political equality or political fairness, an individual right to vote or a group right to vote, and racial reconciliation on the basis of the individual or racial reconciliation on the basis of political equality for groups. Further, the Justices on the Supreme Court must examine these issues and develop an ethos of judicial restraint where the judiciary protects the constitutional rights of citizens to engage in the political process but allow state legislators to follow their constitutional responsibility in creating voting requirements.

In order to proceed with this analysis, I shall focus on the following topoi by James Boyd White in *When Words Lose Their Meaning*, which I adapt for this topic.[118] First, how does the Supreme Court depict the social world, especially in terms of the practice and concept of representation? Second, how do competing opinions in the decisions present

[118] James Boyd White, *When Words Lose Their Meaning*, 10 – 12; James Boyd White, *The Legal Imagination*, xii.

different languages of representation and competing ideologies behind representation? Third, how does the Supreme Court constitute political institutions responsible for the enactment of representation? Fourth, what forms and methods of reasoning are held to be valid in the judicial opinion?

Chapter II examines the history of redistricting form a legal and political standpoint. First, it shows how pervasive redistricting as a heresthetical strategy has been in the United States since Colonial times. Second, it examines the Supreme Court's jurisprudence as a rhetorical tradition. The Supreme Court first hears an apportionment case in the 1910 case of *Richdson* v. *McChessney* and refuses to decide the case because of the "political questions' doctrine. By the time of its decision in *Colegrove* v. *Green*, dissenters to the Supreme Court's decisions rely on empirical evidence to diminish the credibility of the Supreme Court's rhetorical tradition, allowing for the development of a new rhetorical tradition that the Supreme Court would adopt in *Gomillion* v. *Lightfoot*.

Chapter III examines the invention of judicial authority to hear reapportionment decisions in *Baker* v. *Carr*. In *Baker*, a plurality of the Justices seek to reclaim legitimacy in the political process on behalf of "the people" by redefining the scope of judicial power in the "political questions" doctrine and redefining the meaning of the right to vote. Further, because of the Supreme Court's definition arguments, the Supreme Court justices reshape the meaning of the law on which our political institutions rest. Rather than focus on the formalistic rules of the laws, the opinion by Justice Brennan argues that the law must follow the experiences of the people.

Chapter IV discusses the Supreme Court's enactment of the democratic experience under the U.S. Constitution. In reapportionment decisions after *Baker*, a majority of the Justices on the Supreme Court institutionalize the ideology of political equality to enhance the ability of citizens to participate in self-government. In the process, the Justices engage in a debate over the extent of political equality should exist at the local, state, and federal level, especially in relation to the practical considerations of its implementation and the discretionary power of the state legislators to conduct reapportionment and redistricting.

In Chapter V, I examine the turn from political equality to political fairness as the basis of the reapportionment and redistricting decisions during the Court's decisions in the 1970s and 1980s. After the implementation of political equality as the guiding ideology of reapportionment, the Justices on the High Court engage in a debate over interpretive dominance: which vision of representation and which vision of democracy should guide the reapportionment process. On one side of the divide, the Conservative Justices define political fairness in terms of the ability of state legislators to conduct representation and define representation as authorization, leading the constitution of an individual right that privileges state legislators. Further, the Conservative Justices envision a political process that protects a majoritarian conception of democracy and an elite conception of democracy. Conversely, for the Liberal Justices, political fairness concerns the enactment of representation in terms of a group right to vote and the cultivation of

communities of interest. In this vision of representation, groups must possess the ability to compete in the political process and the judiciary must act to protect that right.

Finally, Chapter VI examines the Supreme Court's decisions during the 1990s and the 2000s. During this era of reapportionment and redistricting jurisprudence, the Supreme Court Justices debate one another over the best means to achieve racial reconciliation through redistricting. Similar to the decisions in the 1970s and 1980s, the Justices divide themselves on this question according to their political equality. The Conservative Justices desire the attainment of racial reconciliation by treating citizens as individuals rather than as members of racial or ethnic communities. To preserve this ideology of representation, some of the Supreme Court Justices seek to alter the constitution to incorporate a substantive right of color-blindness, especially in the reapportionment process. Conversely, the Liberal Justices advance an ideology of reconciliation that argues reconciliation between competing ethnic and racial groups can exist only of the divergent groups possess political equality. If groups possess political equality, reconciliation may occur though it may not be necessary to occur in a pluralistic democracy.

Before turning to Chapter II, it is important to note that there are a few limitations with this project. First, this dissertation covers only one aspect of the democratic experience for the American people. It does not include the way in which politicians run campaigns or the way in which the American people perceive campaigns. Unfortunately, other aspects of the American democracy, such as campaign finance or the

quality of campaigns or candidates, which alter our perceptions of the political process, can not be discussed in this dissertation. Second, the work examines the vision of American democracy through multiple Supreme Court Justices over a ninety year period. Our understanding of the democratic experience varies with the Justices' conception of American democracy. One of the most important choices the Chief Justice or senior Associate Justice can make in terms of the development of the American democracy is through the selection of who will write the judicial opinion. One Justice is not responsible for the American democracy. Instead, the democratic experience develops through competing facts and an amalgamation of vision about what democracy means. Even the same Justice over a period of time can alter their own perception of what democracy and political deliberation means as Justice Thomas C. Clarke and Justice Anthony Kennedy did during their tenure on the Supreme Court.

Throughout the Supreme Court's reapportionment and redistricting decisions, the Justices engage one another over the meaning of the democratic experience that sustains the American polity. This work traces the development of American democracy through the decisions of the Supreme Court. By connecting the fields of public address and political theory, the goal of the dissertation is to understand and strengthen the democratic experience for political groups within society. As Whitman writes, "the greatest lessons of Nature through the universe are perhaps the lessons of variety and freedom, the

same present the greatest lessons also in the New World politics and progress."[119] The strength of American democracy rests with the expansion of the democratic experience to citizens and groups. This work examines the expansion of that experience as well as the threats to that experience with the hope that the democratic experience will find new ways to expand and progress.

[119] Walt Whitman, "Democratic Vistas," *Whitman: Poetry and Prose*, (New York: Library of America College Edition, 1996), 953.

CHAPTER II

PARTISAN REDISTRICTING AND THE INCONGRUITY OF THE "POLITICAL QUESTIONS" DOCTRINE IN PRE-REAPPORTIONMENT REVOLUTION CASES

In the Supreme Court decision of *Marbury* v. *Madison*, 5 U.S. 137 (1803), Chief Justice John Marshall provides the first attempt to establish the legal authority of the judiciary and to differentiate the power of the judiciary from the powers of the political bodies.[1] Since the Congress repeatedly failed to demarcate the power of the judiciary, the voice of Chief Justice Marshall constitutes the ethos of the judiciary as the independent voice of the nation: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each"[2] As James Boyd White states in *When Words Lose Their Meaning*, the words of Chief Justice Marshall offers the American people a branch of government like no other, "the development over time, of a self-reflective, self-correcting body of discourse that will bind its audience together by engaging them in a common

[1] Chief Justice John Marshall's view of judicial review was not a revelation on the power of the Court. During the Constitutional Convention of 1787, the delegates interpreted the Court's power in many different ways. Luther Martin of South Carolina pronounced, with little fanfare or disagreement, the Court would decide the legality of the laws. When discussing James Madison's Reversionary Council, John Francis Mercer "disproved of the Doctrine that the Judges [act] as expositors of the Constitution" and that they "should have the authority to declare a law void," (462). Gouverneur [sic] Morris feared the encroachment by the judiciary on the popular branch of government (463). While John Dickinson believed the Courts possessed not the power to set aside law, he knew of no other substitute. Further, Roger Sherman disapproved of the mixture of judges, parties, and politics. When the First Congress discussed the Bill of Rights instead of the power of the judiciary, the political bodies missed another opportunity to demarcate the power of the legislative bodies and the power of the judiciary.

[2] *Marbury* v. *Madison*, 5 U.S. 137, 177 (1803).

language and a culture."[3] Yet, even though the Chief Justice sought to establish the necessary ethos to decide cases and controversies, White argues that Marshall establishes this authority in the name of the people and, if the people desire to revoke the voice of the Supreme Court, they possess the ability though they would the voice of self-correction and the branch of government which provides it.

The creation of judiciary's independent voice relies upon the distinction between that which is political and that which is legal. In *Marbury*, Chief Justice Marshall writes that if legal controversies acts were to be examinable in a court of justice, the judiciary must find a principle to guide the Courts "in the exercise of jurisdiction." When discussing the appointment of William Marbury, Marhsall states that, constitutionally, the president "is invested with certain important political powers, in the exercise of which he is to use his own discretion and is accountable only to his country in his political character, and to his own conscience."[4] Further, Marshall writes that, except for elections, there is no way to control the use of discretionary power since these subjects are political: "they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive," though there is a limit to this discretion as the elected official cannot, "at his discretion sport away the vested rights of others."[5] Marshall states that the conclusion to this dilemma is:

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[3] James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community*, (Chicago: The University of Chicago Press, 1984), 251.

[4] *Marbury* v. *Madison*, 5 U.S. 137, 165 – 166 (1803).

[5] *Marbury* v. *Madison*, 5 U.S. 137, 166 (1803).

> That where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.[6]

The judicial conceptualization of a political question refers to the authority of elected officials to employ the explicit powers from the Constitution. Yet, that discretionary powers exist unchecked by the judiciary until it violates the Constitutional rights of citizens. When a conflict exists between the government and the citizens Constitutional rights, Chief Justice Marshall declares that the judiciary stands as the final arbiter of the constitution, discerning whether a legal right is at stake and the impact of the law on those rights. Channeling the authority of distinguished jurist William Blackstone's *Commentaries*, Marshall states that the focus of the judiciary is to provide a remedy "whenever [a] rights is invaded.... The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[7] To achieve farness, the law must apply equally to all, the laws must protect

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[6] *Marbury v. Madison*, 5 U.S. 137, 166, (1803).

[7] *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

the rights of the people, and the judiciary carries the weight with discerning the violation of rights and the enforcing the protection of those rights.

The original distinction between a political question and judicial questions balances the ability of political bodies to perform their duties and the ability of the judiciary to protect the rights of citizens from being infringed upon by politicians. If citizens object to the discretionary power of the political bodies, then they need to enact change through elections or pursue protection through the courts. If the politician uses discretionary power wisely, then they remain in office; if the politician uses discretionary power foolishly, then the people should revoke the politicians from office. Additionally, the judicial ethos of guardian offers the citizens a venue for remedy if the political branches become unaccountable to the people, reinforcing Constitutional principle of checks and balances. It is through the role of guardian of the people that the judiciary, especially the Supreme Court, protects the political process when partisan forces prevent the people from proclaiming their voice as true sovereigns. The effects of this process may be seen best when the judiciary fails to maintain its ethos as a guardian of the rights of the people as it did in the early reapportionment decisions.

In order to examine the crisis in representation I will, first, discuss political apportionment as a heresthetical tool whereby representatives alter electoral boundaries to ensure a desired result through an election. To examine this concept, I will explore redistricting techniques from the early colonies until the political to show how political parties employed their discretionary power to alter the institutional aspects of elections,

such as the manipulation of district boundaries and population requirements within states, to preserve the protection of their interests at the expense of the citizen. By doing this, I highlight the overwhelming desire of political actors to create districts by which their motives for partisan gain exceed their desires for equal representation for citizens. Further, this chapter foreshadows the challenges in front of the judiciary as it searches for judicial standards that balance the political process with fair representation.

Second, I will discuss the development of apportionment and districting decisions, as well as the "political questions" doctrine, as a rhetorical tradition, providing state legislators the federal judiciary with legal guidelines to create districting maps and discern judicial challenges. This section argues that the competing positions at the state and federal level provide an exigence that needs universal response by the Supreme Court. While lower courts establish equal representation in one state, the need for this to develop in all states, especially for Congressional representation, becomes an imperative that the Court cannot overlook.

Third, this chapter examines the pre-Reapportionemnt Revolution cases. In these cases, the contradiction of the Supreme Court's argument allows the dissenters to create discursive space for a new rhetorical tradition governing apportionment and redistricting, challenging the "political question" doctrine. As the Supreme Court hears cases, provides answers to some reapportionment questions but refuses to engage fully in reapportionment, it diminishes the power of the "political question" doctrine, especially as it relates to the separation of power. As the power of the "political question"

diminishes, the dissenters of the Supreme Court's opinion, circa 1947, provides the authority by which the Supreme Court, circa 1962, can decide reapportionment cases.

Redistricting in the Colonies and the Early Republic

In the United States, redistricting combines competing visions and traditions of the political process, with competing values of equality, liberty, and fairness, and the competing conceptions of the role of the judiciary and state legislators and the constitutional rights of citizens. Politically, elected officials relied upon redistricting to balance, or in some cases overbalance, political and material interests in opposition to the establishment of political quality for individuals or between competing factions. [8] Before the ratification of the United States Constitution, political bodies employed redistricting to balance interests and achieve partisan ends regardless of protecting political boundaries or political communities. For example, the first known partisan redistricting in colonial times occurred in Pennsylvania at beginning of the 18th century when a rivalry developed between the growing cities and the rural counties. In order to retain their power, the rural counties of Bucks, Chester, and Philadelphia received the same representation as the city of Philadelphia though the population of the urban area increased beyond that of the rural area due to immigration.[9] It was not until 1771 that the smaller, rural counties relinquished their hold on power and Philadelphia increased its representation. In New

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[8] Elmer C. Griffith, *The Rise and Development of the Gerrymander*, (New York: Arno Press, 1974), 23 – 25. In Colonial times, the town, county, or parish constituted the basic unit of representation, though the boundaries of such units altered frequently as new settlements emerged and as politicians sought to gain political advantage and ensure political victory prior to elections.

[9] Elmer C. Griffith, *The Rise and Development of the Gerrymander*, 27.

York, governors would refuse to establish new election districts if the governor believed those districts would not support his policies.[10] In North Carolina, governors divided precincts, which had been established though law, to suit their own political ends. In 1732, one governor altered old precincts and created new precincts, even if those precincts contained 30 families, to ensure that legislation would pass through the legislative branch In Georgia, as soon as the colony was established, the governor created districts in an arbitrary manner to aid his preferred faction in the legislative body and ensure that his desired legislation would pass without fail.[11]

Even after colonists fought the American Revolution to ensure fair representation and the ratification of the Constitution preserved a system of checks and balances, legislative bodies employed districting plans to secure partisan advantages. In Virginia, Patrick Henry attempted an act of partisan redistricting to ensure the electoral defeat of his political rival, James Madison. When creating the electoral district, Patrick Henry examined the results of the Virginia Ratification, determined which counties opposed the new constitution and then created a district filled predominantly with anti-Federalists in which Madison needed to run because of residency requirements.[12] In an act of political pragmatism, Madison secured his election through a campaign pledge to introduce and support a Bill of Rights to the United States Constitution, nullifying Henry's attempt at

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[10] Elmer C. Griffith, *The Rise and Development of the Gerrymander*, 26.

[11] Elmer C. Griffith, *The Rise and Development of the Gerrymander*, 29.

[12] Richard Labunski, *James Madison and the Struggle for the Bill of Rights*, (New York: Oxford University Press, 2006), 145 – 148.

political redistricting. In New Jersey, Federalists supported a 1798 apportionment bill that diminished the power of Republicans in such a manner that a Republican state elected a majority of Federalists.[13] In 1802, the voters of Pennsylvania elected all Democrats to office, even though one-third of the state declared themselves to be Federalists.[14] Almost immediately after the ratification of the Constitution, politicians in New York created districts to minimize the strength of the anti-Federalists in 1801, 1802, 1808, and 1809.[15]

The Gerrymander of 1812

While elected officials throughout the colonies and early republic employed redistricting to serve political ends and avoid debate, the legacy, and ultimate triumph or tragedy of the savagery of this political strategy within the electoral process, occurred under the Supervision of Elbridge Gerry in Massachusetts for the 1812 elections and provides the representative anecdotes for all later redistricting successes or failures. The elections and the redistricting plan occurred at a time of great party agitation and strife in the New England region of the United States. The plan developed by the state Republicans, and signed into by the Governor Gerry, exacerbated those partisan tensions and reduced the need and desire for the Federalists and Republicans to reach consensus on the type of economy, commercial or agrarian, and the desired foreign alliances, Great Britain or France, necessary to sustain the Republic. With the heightened partisan tension, the parties exacerbated this tension as they declared the fight between Federalist

[13] Elmer C. Griffith, *The Rise and Development of the Gerrymander*, 50.

[14] Elmer C. Griffith, *The Rise and Development of the Gerrymander*, 53.

[15] Elmer C. Griffith, *The Rise and Development of the Gerrymander*, 43.

and Republicans as the fight between good and evil. Politicians and citizens were no longer constituted as citizens of a state, but conceived as agents in a Manichean struggle for authority. Elections were no longer elections, but epic struggles of war and without drastic redistricting measures, no defeat of the enemy could materialize. Even before the Elections of 1811, both parties knew that the result of those elections would provide the power to reconstitute the State of Massachusetts and the Congress of the United States in its own image. Ten months before the Republicans enacted the redistricting plan, the Federalist's paper, the *Columbian Centinel*, described a "secret plan" to form districts, which will "give a perpetual preponderance to the democratic interest," and will "defy all principle usage, for the sake of consolidating their plan of a complete and lasting possession of the power of the State." [16] Redistricting concerned more than just the interests of the party or the state; it provided a psychological, and almost pathological, advantage of worth that reinforced character, attitudes, and beliefs, especially for the Republicans, who at the same, believed that they lived in an area of Federalist "elitism" in Massachusetts.

One of the most egregious acts of districting developed in Essex County—the basis of the Gerrymander map. Under the traditional districting plan, the County of Essex correlated to five senators—all of whom would have been Federalists; however, since the Republicans created districts by uniting and dividing counties, the Republicans sliced and diced Essex into two separate district, and in the election of 1812, the people elected three

[16] "The Crisis in Massachusetts," *Columbian Centinel,* 24 April 1811 Issue 2822 p. 1.

Republican Senators and two Federalist senators.[17] The term "gerrymander" entered the public vernacular in March of 1812 with *The Boston Gazette's* publication a political cartoon titled, "Gerrymander: A New Species of Monster," in response to the newly enacted senatorial districts in Massachusetts. After viewing the new redistricting map, one commentator noticed that one of the districts appeared to be the in the shape of a Salamander, to which a Federalist newspaper editor replied: ""Salamander! Call it a Gerrymander." The *Boston Gazette* developed a then published a political cartoon, which featured the odd-shaped district in the form of a salamander, complete with a head, wings, and talons. In addition, the left side or west side of the district possess a caricature of Elbridge Gerry. Four days after the Boston Gazette published the photo, the paper printed a clarification on the likeness of Gerry. This article stated that though "some good democrats have gone so far as to say that Mr. Gerry never *did* look so frightfully ugly, and that it is unfair to draw such a picture of him—we were willing to correct the misrepresentations of mistaken honesty but now declare that the Gerrymander is not intended as a personal insult upon the Governor but represents by exact lines and boundaries the new district in the Country of Essex."[18]

In one single act, the paper's cartoon created both an ad personam against Governor Gerry and provided the Republic with a new criterion by which citizens judge redistricting. By highlighting the "deviations," whether exaggerated or not, in the electoral

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[17] "Legislative" *Weekly Messenger,* 7 February 1812 Issue 16 p2.

[18] "The Gerrymander Explained," *Boston Gazette,* 10 March 1812 Vol. 36 Issue 28 p 2.

boundaries, the Federalists attacked the irrationality of the plan and the invidious discrimination that a political party used against citizens of Massachusetts. The visual argument provided a powerful argument to vote the Republicans out of office, if possible, since, as the Federalists claimed, the party threatened the basic civil liberties as it denied citizens the right to vote.

In addition to employing the visual argument, when attempting to oppose the plan, the Federalists invented a rhetorical repertoire of six arguments to fight the redistricting plan that other elected officials would rely upon long after the consequences of the 1812 plan disappeared. By employing these arguments, the Federalists attempted to convince the voters of Massachusetts that the "unjust" redistricting effort contradicted the American ideals of a just, constitutional government and reinforce the notion that partisan politics ought not violate the state Constitution or the ideals and values that established the Revolution or the state Constitution.

First, Federalists argued that certain districts failed to meet the Constitutional threshold for a valid district, especially in relation to a fixed conception of political equality. During the Senate debate, a Federalist Senator implied that the districts were not only unfair to the Federalists but, more importantly, unconstitutional.[19] And, while the

[19] The Constitutional standard for representation was based on tax revenue, where $25.00 equaled one Senator. According to The Weekly Messenger on February 21, under the 1811 district standards, the counties of Franklin and Hampshire received four senators; however, under the suggested plan, these districts would have an assessed value of $93.70, which was $6.30 short of the 4 senator mark, and these districts were to be divided into three separate districts, receiving one senator each. One Federalist senator then stated that under the proposed districting bill, the district of Berkshire, which was assessed at $41.97, would receive two representatives even though it was $8.03 short of the Constitutional standard. See "Debates" *The Weekly Messenger,* 21 February 1812 Vol. 1 Issue 18 p. 1.

Federalists lost representation unfairly, the Republicans gained representation unfairly. In this case, the Federalists argued on a basis of equality in the form that the republican property and republican citizens received more representation than Federalist property and citizens. One hundred and fifty one years later, the Supreme Court invented the "One Person, One Vote" that provided that equality.

Second, the Federalist created arguments that centered on the violation of tradition. In this strategy, the Federalists focused on how the redistricting bill violated the "spirit" of the Constitution as the Republicans ignored the use of traditional practice— using county lines as boarders— and, in the process, split counties and divided neighbors. The tragedy of the bill, according to this view, was that it divided political bodies and eliminated the "local" from receiving representation. During the Senate debate, Col. Flint of Reading proclaimed, "It never before was supposed, that under these words of the constitution, districts might be formed in which no regard is to be had to county limits, to neighborhoods, or to amount of taxes paid."[20] Another Federalist examined how the Republicans attacked this idea of community:

> For what, sir, is a district? Under the present order of things, Heaven only knows what it is; but in any other times I think we should all agree in saying a district was a tract or territory, comprising towns lying in the vicinage and contiguity of each other; whose citizens were, from local situation, necessarily intimate in the duties and business and friendships of life; most likely, therefore, to be acquainted with

[20] "Debates" *The Weekly Messenger,* 21 February 1812 Vol. 1 Issue 18 p. 1.

> the character and talents of those, to whom they might delegate public trusts. Now sir, a district I suppose should be defined, a project for forcing together people the most remote and disconnected from each other, a chart traced by a jack-o-lantern; a plan worked out by the course of the wind, the flight of a bird, or the wanderings of a maniac. For what else, sir, are the lines which your committee have drawn through the state; skipping in one place, crossing in another, running into this corner and taking a democratic town, escaping from a federal town there and with infinite pains going precisely wrong in almost every instance—twisting along like the trackings of a serpent's course through the county of Worcester, and joining together Bristol and Norfolk, in most unholy wedlock, though the friends of both counties forbid the bands!

Historically, in Massachusetts, appeals to community were of high value. In pre-Revolutionary Massachusetts, juries, and not judges, "decided the law applicable to litigated cases.... In a legal system in which juries have the power to find the law, whatever disputes arise cannot be resolved by mere majoritarian fiat but must be resolved by a process of consensus building that produces legal rules acceptable to a broad base of society of a whole."[21] With this reliance on deliberation and consensus, if an individual or group were to violate those community standards then the community must punish those few. Even though by 1810 the community standards, which were largely imposed through an established church, were not as cohesive as they were in the pre-Revolutionary times,

[21] William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society*, 1760 – 1830, (Athens: The University of Georgia Press, 1994), 3.

the elders of the districting generation relied on this notion of community to resist the Republican suggested districts.

In addition to arguing that the 1812 redistricting act violated traditional notions of representation, the Federalists argued that this plan defied the "spirit of the Revolution." In the post-Revolutionary world, Americans believed that the object of law was the preservation of liberty and, further, Americans were prepared to struggle against any doctrine that "tended to destroy the liberties of the people."[22] By relying on traditional violations of liberty, such as "No Taxation without Representation," Federalists attempted to persuade Republicans and voters that redistricting efforts that eliminated actual representation and perpetuated economics harm contradiction political norms within American culture. According to the *The Massachusetts Spy*, the Federalists charged that Republicans violated the basic tenants of the social compact and public virtue: "When we reflect that the grand principle of our social compact, as declared in our Bill of Rights, is 'that government is instituted for the common good; for the protection, safety, and prosperity, and happiness of the people; and not for the profit, honour [sic], or private interest of any one man, family, or class of men," we are astonished at the boldness of this measure."[23] *The Weekly Messenger* declared that Republicans "consulted no other document than the returns of votes for governor" in order to create the districts. [24] And, according to

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[22] William E. Nelson, *Americanization of the Common Law*, 89.

[23] "Debates," *Massachusetts Spy,* 26 February 1812 Vol. XL Issue 2025 p 1.

[24] "Legislative," The *Weekly Messenger,* 7 February 1812 Issue 16 p 2.

the Federalists, the reason why the Republicans created an unconstitutional act, divided communities and neighbors, and disregarded the principles of the revolution, in order for the rulers of Massachusetts to "secure power by depriving the people of their rights. This monstrous system of usurpation, may be seen… [as a] direct violation of the Constitution, and for no other possible preference than to secure the election of two democratic senators."[25]

Third, Federalists argued that the redistricting act violated the economic liberties of the people to engage in commerce. On one level, the Federalist charged that the Republicans altered the Massachusetts vision of liberties, especially in relation to commerce, to establish a Jeffersonian vision of the agrarian life. *The Columbian Centinel* declared that the threat to commerce and, hence freedom, occurred through the reign of Jefferson and the planters of the South, who "own slaves but no ships."[26] The paper called upon the Federalists to prevent Republican redistricting and to save the Union. On a second level, the transformation from a commercial life to agrarian life threatened to irritate political and economic relations between the United States and Great Britain. According to *The Weekly Messenger*, the redistricting effort crated a "reign of Terror and Proscription," that "drained the Country of Wealth and rendered us less prepared for War."[27] Building upon the anxiety of American foreign policy, the Federalist believed that

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[25] "Worcester," *Massachusetts Spy,* 19 February 1812.

[26] "The Voice of Patriotism," *The Columbian Centinel,* 27 April 1811 Issue 2023 p1.

[27] "To The Free and Independent People of Massachusetts," *The Weekly Messenger,* 14 February 1812 Vol. 1 Issue 17 p1.

the redistricting attempt would not only weaken commerce but to further corrode the relationship between the United States and Great Britain to expand a Jeffersonian-Jacobin plot the destroy the United States.

Fourth, the Federalists argued that the Republicans violated the basic principle of majority rule and self-government, even though the Republicans won the elections of 1811, which placed the minority party in position to control the districting process. During the Senate debate, Senator Brown of Boston conceded that officials ought to be elected into office by the will and opinion of the majority; however, this bill would create a false majority for the next ten years and violate norms of proportionality:

> This bill seemed to him to be so formed as to be an attempt to fetter public opinions full effect; and to continue this effect for ten years, let what might happen in the mean time as to other branches of the government; that is this was the design, those to who the public are indebted for this ingenious contrivance ought to come out with their reasons that the public may judge of them.[28]

If the Republican were unable to "win" elections naturally, they could only obtain victory if they manipulated the districts to "win" an artificial majority. Further, the Federalists argued that the bill prevented representation as the plan manipulated the true political character of the state as it would represent neither the property nor the people of Massachusetts.[29] Additionally, the redistricting bill would change the nature of

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[28] "Debates" *The Weekly Messenger,* 21 February 1812 Vol. 1 Issue 18 p 1.

[29] "Legislative" The *Weekly Messenger,* 7 February 1812 Issue 16 p2.

government, causing democratic reforms that threatened the ruling elites. According to the *Columbian Centinel* in April of 1811, "We are then to expect that the valuation is also to be managed so as to aid the cause of democracy,- In other words, federal towns are to be punished for their political sins, by paying a greater portion of the public burdens than their democratic neighbors."[30]

Finally, while Federalists relied on the topos of majority rules, they employed also the "Heads I win, tails you use" strategy.[31] As they argued that Massachusetts was a Federalist state and, therefore, they should have more representation, they also argued that minority rights, especially the minority rights of Federalists, should be protected, though historically, it is not clear that the Federalists followed this view with Republicans. One common argument by the Federalists focused on the fact that while Jeffersonians insisted on the rights of minorities within a county to "enjoy some representation, critics noted that no similar solicitude was shown for Federalist minorities."[32] Furthermore, while they supported the "will of the majority" they tried to restrict the increase of the voting population in the State, calling into question of their definition of a "majority."

In defense of the plan, the Republicans argued that they possessed the authority to enact the legislation since they controlled the House, the Senate, and the Governor's

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[30] "The Crisis in Massachusetts," *Columbian Centinel,* 24 April 1811.

[31] In *Attitudes Toward History*, Kenneth Burke writes that the "Heads I Win, Tails You Lose," strategy is a device whereby a person accounts for opposing results. Kenneth Burke, *Attitudes Toward History* (Berkeley: University of California Press, 1937), 260.

[32] Paul Goodman, *The Democrat-Republicans of Massachusetts: Politics in a Young Republic*, (Cambridge: Harvard University Press, 1964). 145.

Office. For the Republicans, redistricting presented itself as a legislative act that coincided with the normal function of government. The act is neither just nor unjust; it is the "mere continuation of politics by other means."[33] One senator from Marblehead seemed content with the bill since it reflected a district from 1802.[34] A second senator provided a more humorous, and literal, defense of the bill:

> Mr. Adams has exhibited to us a map, but he nevertheless seems to be ignorant of the nature of lines. When geographers lay down lies, we all know, sir, that such lines do not really exist, that gentleman seems to be afraid that he shall not be able to get over these lines; but I can assure him, that he will not be stopped by these lines—he will not even have to jump his horse over them…I am sure, and I wish that gentleman might feel the same confidence that I do of his future ability to get to meeting, or to the court-house, as he has been accustomed to do.[35]

When making this comment and reducing the debate to the literal, Senator Austin of Charleston advanced this idea that the proposed districts would not prevent the Federalist Senators from traveling from district to district and, more importantly, from doing their jobs—representing the people. Further, he argued that the lines on the map were arbitrary and not natural, meaning that the Federalist vision that the Republican vision violated the

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[33] Carl von Clausewitz, *On War,* (New York: Barnes and Noble Publishing, 2004), 17. The quote, "We see, therefore, that War is not merely a political act, but also a real political instrument, a continuation of political commerce, a carrying out of the same by other means," provides an insightful glance at the practice of partisan redistricting during times of extreme partisan tension.

[34] "Debates" *The Weekly Messenger,* 21 February 1812 Vol. 1 Issue 18 p. 1.

[35] "Debates" *The Weekly Messenger,* 21 February 1812 Vol. 1 Issue 18 p. 1.

natural order of representation for Massachusetts was incorrect and the "natural" was as arbitrary as this plan. Even though under this bill Republicans would have gained seats over the Federalists, there still would be representatives to represent the people and their property.

As a result of the elections, twenty-nine Democratic senators were elected from 50,164 votes; Eleven Federalists were elected from 51,7666 votes; the Federalist candidate for governor, Caleb Strong, received 51,326 votes while the Republican candidate, Elbridge Gerry received only 51,321.[36] Though the majority of votes in the two elections show a Federalist majority in the state, the Republicans seized control of the Senate, altering not only the representation at the state level—the representation of the State legislature was 429 – 321 in favor of the Federalists—but also at the Federal level since the Republicans gained power to elect federal senators.

After the Republicans enacted the redistricting bill, the Federalists continued their assault on the plan and constituted it, in Federalist newspapers, as an attack on "the people." On February 19, 1812, the *Massachusetts Spy* printed an article that said the rulers of Massachusetts engaged themselves in an inquisition in order to project and "secure power by depriving the people of their rights. This monstrous system of usurpation, may be seen… [as a] direct violation of the Constitution, and for no other possible preference than to secure the election of two democratic senators."[37] Another article in the paper,

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[36] Elmer C. Griffith, *The Rise of the Gerrymander*, 64.

[37] "Worcester," *The Massachusetts Spy*, 19 February 1812.

under the heading "'The Zig-Zag Progress of Democracy, or 'The Acts of Able'—Legislatures,' stated that they [the authors], "can't but admire" the districting efforts that secured power and punished "the incorrigible rebelliousness of the federal county of Worcester."[38] The article continued: "All 'friends of the government' must allow that this was highly proper and necessary; that the people if left to themselves are their own worst enemies' and that the paternal interference of the Legislatures was necessary to secure against the mischief they are in danger of doing."[39] A week later, the paper again printed an article against the redistricting plan:

> We commence debate on one of the most remarkable measures, that every occurred in a free, elected republick [sic]. When we reflect that the grand principle of our social compact, as declared in our Bill of Rights, is 'that government is instituted for the common good; for the protection, safety, and prosperity, and happiness of the people; and not for the profit, honour [sic], or private interest of any one man, family, or class of men," we are astonished at the boldness of this measure. The federalists have said (and have been severely reproaches for doing so) that if our republic should be destroyed, it will be done by the violence of democracy. The most despondent among us could not have imagined such rapid

[38] "Worcester," *Massachusetts Spy,* 19 February 1812.

[39] "Worcester," *Massachusetts Spy,* 19 February 1812.

> progress in the career of destruction, as has been seen by ever man since Governour [sic] Gerry's reelection.[40]

According to Federalists, in free republics that utilize elections, elections need to secure the wishes of the people and not the wishes of the Party. Yet, at the same time, the Federalists warned against the danger, violence, and vulgarity of democracy as a form of representation, which diminished the party's call for virtuous restraint in the districting proces. The Federalists protested the way in which the Republicans violated the natural order of representation in Massachusetts. Consequently, the concern over redistricting in 1812 focused on the arbitrariness of electoral practices and the ability to protect the right to vote for those who identify with your party.

While the original Gerrymander was to be seen as the final victory of Republicans over the Federalists, the districting lasted one year and, in 1813, the Federalists reclaimed control of all three branches of government, allowing the party to create a new electoral map. After the death of the first "Gerrymander," the *Boston Gazette,* a Federalist newspaper, *lamented* its passing with the following report:

> The Gerrymander expired on Monday last, leaving, we trust, but few mourners to lament its loss, and inspiring joy among all the friends of rational liberty and just principles of representation. Immediately after its birth, we had the pleasure to present its likeness to the public, together with an account of its genealogy and its relationship to Gov. Gerry. Its monstrous deformity bearing no small resemblance

[40] "Debates," *Massachusetts Spy,* 26 February 1812.

> to the political creation of its parent, had strongly excited public attention as well as universal disgust. The term *Gerrymander* is now used throughout the United States, as synonymous with deception, as when a man has been swindled out of his rights by a villain, he says he has been *Gerrymandered*, in allusion to the to the cheat practices upon the people's rights in the creation of the present senatorial districts. Peace to its ashes; we hope the legislature at the next session will quiet its ghost, by giving its unburied body the "the rites of sepulture."[41]

In only a year's time, the Republicans' "End-All Victory" disintegrated, leaving the Federalists in control of Massachusetts. During the 1812 election, the Gerrymander developed into a prominent political issue and helped the Federalists reclaim office. Even though Federalists deathly feared the "Gerrymander," and believed the Republic lived in its last throes, Massachusetts survived. Since the citizens of Massachusetts changed their vote and elected Federalists, the Federalists possessed the power to counteract the Republicans.

Gerrymandering After 1812

After the infamous gerrymander of 1812, the politicians continued the practice throughout the states as political parties launched regional campaigns to protect interests. In the decade after the initial Gerrymandering, the practiced continued not only in Massachusetts, but also in New Hampshire, Maryland, Connecticut, Maryland, Ohio,

[41] "The Gerrymander," *Boston Gazette*, 8 April 1812 Vol. 38 Issue 31 p 3.

Pennsylvania, and Virginia.[42] While for a time, popular sentiment declared gerrymandering as a political evil, as long as district elections determine representation, the ambition to win elections determines the use of the gerrymander as a political weapon. Yet, during the "Era of Good Feeling," the partisan politics throughout the country decreased; and as a result, Congress and state legislators introduced legislation aimed at limiting the partisan creation of districts. For example, the Alabama constitution prevented the practice of dividing up counties and required districts to be of contiguous territories.[43] During a constitutional convention in Massachusetts, the delegates agreed that districts were to be comprised of counties. During a constitutional convention in New York, delegates introduced the idea of using single-member districts that were to be contiguous and infringe, as little as possible, on the integrity of the counties; however, this objection to the partisan gerrymander did not pass.[44] In Maine, delegates to a Constitution Convention sought to end partisan gerrymandering by eliminating the use of single-member districts and believed that the people of the state would reject the

[42] Elmer C. Griffith, *The Rise and Development of the Gerrymander*, 92 – 100. In Massachusetts, the battle between Federalists and Republicans continued when in 1814 Federalists gerrymandered Democrats to retain a majority in the state senate. In 1816, Democrats in New Hampshire responded to the gerrymander in neighboring Massachusetts as they diminished the power of Federalists. In the same year, Federalists in Maryland suffered unproportional losses at the polls when Democrats packed the Federalists into districts to ensure Democratic gains. Gerrymander as an electoral strategy continued throughout the mid-nineteenth century in Connecticut, Maryland, Massachusetts, Ohio, Pennsylvania, and Virginia. As elected officials relied on the practice to win elections, popular opinion supported its use as a necessary political strategy to retain power and, while not desirable, was fair game unless it was inconsistent with the constitution itself.

[43] Elmer C. Griffith, *The Rise and Development of the Gerrymander*, 95.

[44] Elmer C. Griffith, *The Rise and Development of the Gerrymander*, 97.

Constitution if it allowed for single-member districts.[45] In a move to reduce the probability of gerrymandering, Congress passed the Apportionment Act of 1842, which stated that Representatives must be elected from contiguous single-member districts.[46] In 1862, Congress retained the contiguity standard and added an additional requirement, "as nearly practicable an equal number of inhabitants."[47] By 1901, Congress added compactness as a standard and, in 1911, Congress renewed those four requirements though it would do so for the last time.[48]

By examining the historical practice of the gerrymander, certain conclusions demonstrate the use and, at times, the acceptance of the practice as an essential political strategy to secure votes and interests within a state even if those practices conflict with American ideals or Constitutional requirements. First, since colonial times, politicians employed gerrymanders to gain votes, secure interests, and diminish the power of the oppositional party prior to the election. The concept existed well before the infamous Gerrymander of 1812 and, for better or worse, its use developed as a political tradition, especially during times of extreme partisanship. Second, Legislative reform attempted to limit the consequences of the practice and protect minority voices though, as I will discus

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[45] Elmer C. Griffith, *The Rise and Development of the Gerrymander*, 98.

[46] *Vieth* v. *Jubelirer*, 541 U.S. 267, 276 (2004).

[47] *Vieth* v. *Jubelirer*, 541 U.S. 267, 276 (2004).

[48] *Vieth* v. *Jubelirer*, 541 U.S. 267, 276 (2004). Today, Single-Member districts are the only Congressional requirement as the judiciary incorporates the other requirements into its redistricting and reapportionment jurisprudence. As Justice Scalia notes in his plurality opinion, since 1980 Congress introduced five bills to regulate gerrymandering though all have failed. Additionally, the states have charted their own course to handle this problem and reduce the influence of partisan politics in the redistricting process.

in the next chapter, the legislation did not persuade the legislators to pursue partisan interests through districting. Third, while the gerrymander can be an effective political strategy, the effects of the strategy vary from election to election. However unfair, gerrymandering works best when one party controls all three branches in a state as well as both Houses in the legislature. Further, a districting plan may not be able to consistently win seats for one party throughout a state on a regular basis, though securing a majority may be all that is needed. The infamous Gerrymander of 1812 lasted only one year and allowed Republicans to elect two senators to Congress but Massachusetts Federalists regained control of the legislative and executive branches and employed gerrymanders for the next ten years to diminish the strength of the Republicans. In addition, positive gains by a party one state, such as Massachusetts in 1816, may be offset by negative losses in another state, such as New Hampshire and Maryland in 1816. Also, for a gerrymander to be successful, it requires a populace to maintain its political views without change from issue to issue or politicians to politician. Finally, while states employed such tactics as prohibiting the division of counties and creating contiguous districts sough to prevent the possibility of gerrymandering other strategies to diminish the strength of the gerrymander, these tactics need enforcement and if the political bodies choose to ignore these tactics or reapportionment altogether, little could be done.

Pre-Reapportionment State Court Challenges

Before the Reapportionment Revolution, advocates for the judiciary's entrance into the political thicket petitioned the judiciary through the state courts. However, the

results of those cases, first, varied from state to state and, second, received no recognition by the Supreme Court until 1910. At the state level, the authority of the state courts rests with the "judicial function" as determined by the state constitution, which reduces the likelihood that the state court follows the federal separation of power doctrines and allows the court more opportunity to decide "political" cases.[49] Furthermore, in apportionment cases, the state courts must follow constitutional guidelines not present in the U.S. Constitution of the United States such as institutional requirements such as fixed ceilings on the size of the legislature and fixed rations between the size of the state senate and state lower house, redistricting requirements such as equal population, contiguity, and compactness, and other political interests such as traditional political boundaries, political party impact, and bicameralism.[50] Even though two states constitutions may possess the same requirements for the protection of political subdivisions, compactness, or equal population, the judiciary in one state may decide that it is the judiciary's role to decide districting cases while a judiciary in another state may decide districting is a political question. In these cases, some state courts held that redistricting was a political and not judicial issue[51] while other state courts argued that the state courts possessed the authority

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[49] Robert G. Dixon, *Democratic Representation: Reapportionment in Law and Politics*, (New York: Oxford University Press, 1968), 102 - 103. Dixon examines the judicial practice of Virginia whereby the court hears cases to determine annexation of land. In these cases, the Virginia court orders the annexation of land to cities, determines boundaries, and specifies financial conditions, which may be considered work of the political and legislative bodies (103).

[50] Robert G. Dixon, *Democratic Representation,* 104.

[51] According to the Court in *The State Ex Real. Attorney General* v. *Cunningham*, 81 Wis. 440, N.W. 724, (1892), only three cases intimated that the Court possessed no jurisdiction to hear apportionment cases (729). Those cases are *Opinion of the Justices* in 142 Mass. 601, 7 N.E. 35, and 10 Gray 613; and *Wise* v.

to hear and decide redistricting cases if the redistricting bill violated constitutional provisions.[52] In select cases, state legislators designated reapportionment as a judicial question and authorized the Courts to examine the constitutionality of reapportionment cases.[53] At the very least, the courts' involvements in these cases suggest that *Baker* v. *Carr*

Bigger, 79 Va. 269. Other cases in which the judiciary declines to strike down an apportionment case due to political power or political questions are *William H. Woodyatt* v. *James H. Thompson*, 155 Ill. 451, 40 N.E. 307, (1895) and *State ex rel. Winnie* v. *Stoddard*, 25 Nev. 452, 62 Pac. 237 (1900).

[52]State courts in Kansas, Maine, Massachusetts, Michigan, New York, New Jersey, North Carolina, Ohio, and Virginia declared that courts possessed jurisdiction to hear apportionment cases and possessed the authority to nullify reapportionments though they only did so on a few occasions. In *State ex rel. Gardner* v. *Newark*, 40 N.J.L. 297, *State ex rel.* v. *Campbell*, 48 Ohio St. 435, 27 N.E. 884, *State ex rel.* v. *Campbell*, 48 Ohio St. 435, 27 N.E. 884, *State ex rel. Evans* v. *Dudley*, 1 Ohio St. 437, *State ex rel. Singleton* v. *Van Duyne*, 24 Neb. 586, 39 N.W. 612, *Prouty* v. *Stover*, 11 Kan. 235, *State ex rel. Att'y Gen.* v. *Francis*, 26 Kan. 724, and *Smith* v. *Bd. Of Super*. St. L. Co 148 N.Y. 187, 42 N.E. 592, (1896) the Court ruled that it possessed jurisdiction of apportionment cases, though it upheld the apportionment plans in question. In *Opinion of Judges*, 6 Cush. 575, 578; *Warren* v. *Charlestown*, 2 Gray 84; *Kinney* v. *Syracuse*, 30 Barb. 349; *People ex rel. Att'y Gen.* v. *Holihan*, 29 Mich. 116, and *People ex rel. Att'y Gen.* v. *Bradley*, 36 Mich. 447, the state Courts nullified reapportionment plans because the state legislators reapportioned before a federal enumeration, which violated the constitutions of the respective states.

In cases from Illinois, Indiana, Kentucky, Michigan, New York, West Virginia, and Wisconsin, the State Supreme Courts declared that the court not only possessed jurisdiction, but also the power to strike down reapportionment cases if they conflicted with the Constitutions of their respective states and the Courts could impose constitutional limitations upon the legislatures apportioning power when the state legislatures reapportioned The Illinois case is *People* v. *Thompson*, 155 Ill. 451, 40 N.E. 307. The Indiana cases are *Denney, et al.,* v. *State*, 144 Ind. 503, 42 N.E. 929, 31 L. R. A. 126 and *Parker* v. *State, ex re;. Powell*, 133 Ind. 178, 32 N.E. 836 (1892). The Kentucky case is *Ragland* v. *Anderson*, 125 Ky 141, 100 S.W. 865, (1907). The Michigan cases are *Williams* v. *Secretary of State*, 145 Mich. 447, 108 N.W. 749; *Giddings* v. *Blacker*, 52 N.W. 944, 16 L. R. A. 402; *Supervisors* v. *Blacker*, 52 N.W. 951, *People ex rel. Att'y Gen.* v. *Holihan*, 29 Mich. 116. The New Jersey Case is *State* v. *Wrightson*, 56 N.J.L. 126, 28 A. 56, 22 L. R. A. 548. The New York cases are *Kinney* v. *Syracuse*, 30 Barb. 349, Sherrill v. O'Brien, 188 N.Y. 185, 81 N.E. 124 (1907), People ex rel. Cassidy v. Whalen, 198 N.Y. 534; 81 N.E. 1172, (1907), *People* v. *Rice,* 135 N.Y. 473, 31 N.E. 921, 16 L. R. A. 836, and *People ex rel. Baird* v. *Board of Supervisors of Kings County*, 138 N.Y. 95, 33 N.E. 827 (1893). The West Virginia Case is *Harmison* v. *Ballot Commissioners*, 45 W. Va. 179, 31 S.E. 394, 42 L. R. A. 591. The Wisconsin cases are *Slauson* v. *Racine*, 13 Wis. 398, *The State Ex Real. Attorney General* v. *Cunningham*, 81 Wis. 440, N.W. 724, (1892) and *The State Ex Rel. Lamb* v. *Cunningham,* 83 Wis. 90; 53 N.W. 35, (1892).

[52] Robert G. Dixon, *Democratic Representation,* 104.

[53] See *Slauson* v. *Racine*, 13 Wis. 398, *Opinion of the Justices* in 3 Me. 477; 18 Me. 458; 33 Me. 587; 7 Mass. 523; 15 Mass. 537; 3 Pick. 517; 23 Pick. 547; 6 Cush. 575; 10 Gray, 613; *Henshaw* v. *Foster*, 9 Pick. 312; *Capen* v. *Foster*, 12 Pick. 485; *Warren v. Charlestown*, 2 Gray 84; *Stone v. Charlestown*, 114 Mass. 214.

was not a novel decision and there was a minimal level of precedent to provide judicial guidelines on how to handle apportionment cases.[54]

In the cases where the State Supreme Courts intervened into state reapportionment, the courts followed textual arguments via the state constitutional requirements to resolve redistricting cases. By doing this, the judiciary maintained an ethos of judicial restraint, which minimized the arguments that the state judiciary violated its judicial role as it answered political questions. For example, in the cases of *Attorney General* v. *Cunningham* (Cunningham I) and *The State Ex Rel. Lamb* v. *Cunningham* (Cunningham II), the Wisconsin Supreme Court ruled that 1891 and 1892 reapportionment plans violated the state's constitutional requirement of respecting political subdivisions (*Cunningham I*) and equal population (*Cunningham II*). [55] Even though the redistricting plan resulted in partisan consequences, as press reports focused on a belief that Democrats attempted to gerrymander the Republicans out of power, a move that disrupted the historic nature of the Republicans hold on power in the State of Wisconsin,[56] the judiciary focused on the higher, constitutional violations.

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[54] Robert G. Dixon, *Democratic Representation,* 104.

[55] *The State Ex Real. Attorney General v. Cunningham*, 81 Wis. 440, N.W. 724, (1892) and *The State Ex Rel. Lamb* v. *Cunningham*, 83 Wis. 90; 53 N.W. 35, (1892).

[56] "The Wisconsin Gerrymander," *The New York Times,* 30 June 1892 p4. The article notes that, historically, while the Republicans controlled both Houses of Wisconsin for 30 years, the Democrats won the 1890 elections, " due to many causes, principally the raising of the English compulsory education issue." When the Court decided the issue, The Washington Post remarked that even *honest* Democrats would believe that Court's decision resulted in good government and both parties should be willing to the necessity of judicial checks and balances to "prevent encroachments upon fair expressions of the popular willing the choice of legislative representatives." See "The Wisconsin Gerrymander," *The Washington Post,* 26 March, 1892 p4.

In *Cunningham I*, the Wisconsin Supreme Court maintained that it possessed the authority to interpret the laws and declare an act of the legislature unconstitutional because of the voice of the constitution itself. Since the state constitution required redistricting efforts to protect political units and the redistricting effort of the legislature divided political units, the legislature violated the state constitution. [57] In *Cunningham II*, the Wisconsin State Supreme Court declared the 1892 apportionment plan unconstitutional because of extreme variances in population within legislative districts.[58] The majority of the Court interpreted the requirement that apportionment is to be based on inhabitants as, first, meaning that this means districts ought to be "as close an approximation to exactness as possible and this is the utmost limit for the exercise of legislative discretion," and second, the inhabitants criterion is to be the controlling factor in apportionment, more important than contiguity and compactness.[59]If the court or the legislature were to subordinate the equal population requirement to compactness, there

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[57] *The State Ex Real. Attorney General* v. *Cunningham*, 81 Wis. 440, 484 - 486, N.W. 724, (1892)

[58] *The State Ex Rel. Lamb* v. *Cunningham*, 83 Wis. 90, 143 - 156; 53 N.W. 35, (1892). The Court stated that no defense was made for the variations of assembly districts. Based on the population from the 1890 census, the ideal district was 16,868 and the 1892 reapportionment plan created districts with a population of 8,626 and another of 25,111. The ideal Senatorial district was 51,117 and the plan called for districts of 30,732 and another of 65,952.

[59] *The State Ex Rel. Lamb* v. *Cunningham*, 83 Wis. 90, 143 - 156; 53 N.W. 35, (1892). In a dissent, Justice Winslow argued that the equal population requirement was one of many requirements and the focus of the constitutional command for the state legislators should not be on "according to population," but the qualifier, "as reasonably practicable." The other requirements were, in the assembly, no country, town, or ward shall be broken, the districts should be of contiguous territory, and they should be compact; for the senate, no assembly district should be divided and each district should be convenient and contiguous. These requirements made equal representation impossible and to focus on equal representation you will need to neglect compactness. What is needed is a "latitude of action" and this discretionary power falls to the legislative bodies and not the Courts, (162).

would be no criterion to define how compact is compact, reducing the need for the equal population requirement in the first place.

In these redistricting cases, the Wisconsin State Supreme Court acted on the premise that the judiciary possesses the authority to strike down legislative acts that violate the text of the constitution especially if those acts diminish the rights of the people. In *Cunningham I*, The Court's argued that an "apportionment law is like all other laws which this court has declared unconstitutional," meaning that even if there were political and partisan implications to the redistricting measure, that bill is a matter of law and subject to explicit constitution requirements. If the judiciary possessed the authority of judicial review for one law then it possessed it for all laws; if a law contradicted the requirements of the constitution, then the judiciary possessed the power to strike down that law.[60] In *Cunningham II*, the State Supreme Court acknowledged the discretionary power of the legislative branch but ruled that its discretionary power cannot violate other textually commands. Similar to the arguments in *Marbury* v. *Madison*, the Wisconsin State Supreme Court ruled that the legislature cannot threaten the people's state constitutional right to representation by disregarding the constitutional requirements of representation of inhabitants.

Yet, while the Wisconsin Court struck down reapportionment cases based on Constitutional provisions, the State Supreme Court of Nevada upheld a reapportionment plan because the Nevada Court believed that the state's legislature possessed the necessary

[60] *The State Ex Real. Attorney General* v. *Cunningham*, 81 Wis. 440, 480 N.W. 724, (1900).

discretionary power to reapportion the state without judicial scrutiny. At the time of the case, the Nevada Constitution required that apportionment would be based on the inhabitant of the state as determined by the census. In 1899, nine years after the last census, the state legislature reapportioned the state based on the 1890 census, a move that the plaintiff, W.E. Winnie, the district attorney of Storey County, argued was unconstitutional since the redistricting bill could not have been based on population but partisan interests and, since the districts were not based on population, then the districts were unconstitutional. [61] Though the judiciary stated that neither party questioned the ability of the judiciary to hold an apportionment act, "in a proper case," unconstitutional and that this authority was, "so well established as not to require discussion or citation of authorities to support it," the court ruled that the legislature relied upon its discretionary power to redistrict the state and, unless a clear constitutional violation was presented, the judicial branch must follow the discretion of the legislative branch.[62] The decision states that the presumption of judicial skepticism of legislative acts is unwarranted: "It is fundamental that every law passed by the legislature and approved by the governor is presumed to be constitutional; every intendment is in its favor and it should be sustained

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[61] *State ex rel. Winnie* v. *Stoddard*, 25 Nev. 452, 456 (1900). In 1899, the state legislature altered the state's districting scheme, reducing the number of representatives in Storey County received. W.E. Winnie argued that since the redistricting measure was not based on "inhabitant," the state ought to reverse back to the 1891 districting plan. Further, he argued that the judiciary in other states struck down redistricting plans because they violated the constitution. This case is similar to the 2004 Texas redistricting when Texas Republicans initiated a redistricting effort in 2003 after the Texas Democrats finalized a plan in 2002. The Texas Democrats argued that the redistricting by the Texas Republicans was unconstitutional because of the unusual time in which they redistricted, though there is no legal or constitutional requirement as to when a party can redistrict.

[62] *State ex rel. Winnie* v. *Stoddard*, 25 Nev. 452, 456 (1900).

unless there are specific constitutional restrictions upon the power of the legislature, and the law is shown to be within those restrictions."[63] Since the state constitution failed to provide strict requirements as to the frequency of redistricting, regardless of whether or not the number of inhabitants changed in nine years, the legislative branch was free to use its discretionary power "as often as it wills."

Further, the Court noted that if it were to find this redistricting act unconstitutional because it was not based on the number of inhabitants, then it would need to find prior redistricting acts unconstitutional. Relying on a redistricting decision from the state of Indiana, the Nevada court reasoned that if the present plan were not based on population, then the prior plan would no longer be based on population, especially if new towns were created after the enactment of the old plan.[64] If the judiciary cannot reinstate a prior redistricting plan, then the plaintiffs do not possess standing to bring forth a legal claim there can be no remedy. By adhering to the authority of the Indiana decision, the Nevada State Supreme Court held that no clear constitutional issue, the decision would be a detriment of the case, and there is no clear right to be protected.[65] Rather than striking down the redistricting plan based on the textual requirement of number of inhabitants, the Nevada Supreme Court argued that this redistricting act presented no legal questions and was subject to the discretionary power of the state.

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[63] *State ex rel. Winnie* v. *Stoddard*, 25 Nev. 452, 456 (1990).

[64] The Indiana case is *Parker* v. *State*, 133 Ind. 178, 32 N.E. 836, (1892).

[65] *State ex rel. Winnie* v. *Stoddard*, 25 Nev. 452, 464 (1990).

The Wisconsin cases and the Nevada case provide examples of how State Courts answered the reapportionment cases based on their respective constitutions, the constitutional powers of the judiciary and legislative branches, and the reliance on other precedents. While some states possessed constitutional restraints such as needed electoral districts that were to be equal in population, state Courts interpreted those provisions differently, especially in light of the legislature's discretionary power. Without any form of universal standards for representation, the state courts invented their own solutions to the cases at hand and would continue to do so until *Reynolds* v. *Sims*, 377 U.S. 533 (1964). Without universal standards, redistricting would be subjected to local prejudices and tensions, especially with challenges to Congressional districts.

Even after the Supreme Court first heard and decided reapportionment cases, states continued to take divergent paths in order to find the correct solution to reapportionment. Between *Richardson* v. *McChesney* in 1910 and *Baker* v *Carr* in 1962, the state and federal courts heard oral arguments over redistricting and reapportionment cases in 26 separate cases. Similar to the preceding cases the results varied by state. In Illinois, citizens petitioned the state and federal courts over malapportionment, hoping to force the legislators to act but failed nonetheless. As a result, advocates initiated other strategies, such as petitions to mandamus the legislature, restrain payment of salaries to legislatures, initiate quo warranto proceedings against legislatures, to bar the governor from certifying elections, to avoid federal taxes pending federal enforcement of the "republican form of

government," and to invalidate laws made by the malapportioned legislature.[66] In Massachusetts, cases aimed at declaring reapportionment plans unconstitutional; however, as a result of the case, the Court initiated a return to a pervious reapportionment plan, which further increased the inequities in the ratio between representatives and represented.[67] Without further action or help from the legislature, the Court decided it could not reduce the disparity through judicial enforcement. Without judicial standards from an authoritative body, reapportionment varied from state to state, leaving a citizen's right to equal or fair representation varied as well.

The Pre-Revolution Seven: Judicial Deference and the Illusion of Self-Government

In 1910, the United States census revealed, for the last time, the dominance of rural America. According to the 1920 census, and in each subsequent census, urban demographics dominated the census, as the majority of America's population resided in urban areas. While a change in demographics occurred in the early part of the twentieth century, a change in representation failed to occur until the 1960s. Politicians, at both the state and federal level, ensured that the change from a rural nation to an urban nation would not occur by their hands until those hands were forced by the decisions of Supreme Court.

Between 1910 and 1960, the Supreme Court heard arguments on seven reapportionment cases. The issues in these cases range from can the Courts interfere with the work of the political branches, which political branch has the power to contribute to

[66] Robert G. Dixon, *Democratic Representation*, 106.

[67] Robert G. Dixon, *Democratic Representation*, 107.

the reapportionment process, what is the correct interpretation of the "legislature," what is the intent of Congress in reapportionment, and to what extent a state can reapportion black citizens out of a township. In these cases, the Courts created a contradictory ethos in terms of its involvement in reapportionment and redistricting an failed to provide a coherent demarcation between a political question and a legal question. While it attempted to define redistricting as a political question and deferred judgment to the state legislature, a majority of the Supreme Court appropriated Congressional power on a case-by-case basis, allowing for some judicial involvement even as it argued for the separation of the political from the legal. Yet, because of the Supreme Court's unanimous decision in *Gomillion v. Lightfoot*, 364 U.S. 399 (1960), the Supreme Court contradicted its previous arguments involving redistricting and political questions and provided a future court with argumentative grounds to decide reapportionment and redistricting cases. Though the Pre-Reapportionment Revolution decisions fail as a communicative act in so far as they present conflicting approaches to the Court's involvement in reapportionment, these decisions provided a later Supreme Court with the authority to act during the 1960's.

Rhetorical Traditions, Political Questions, and Judicial Restraint

The Supreme Court's apportionment jurisprudence provides the justices with a rhetorical tradition from which rules and guidelines to decide present and future cases. Thomas Farrell writes that, "Social knowledge comprises conception of symbolic relationships among problems, persons, interests, and actions, which imply (when

accepted) certain notions of preferable public behavior."[68] John Murphy writes that rhetorical traditions "consist of common patterns of language use, manifest in performance, and generative of a shared means for making sense of the world," and provide speakers and their audiences with a "cultural grammar" of understanding.[69] Rhetorical traditions organize the social knowledge for communities and allow speakers with a source of invention of arguments, "aimed at authoritative public judgments."[70] Murphy writes that "invention becomes the orchestration of the resources of the rhetorical tradition," and authority develops from the "reaacentuation of the rhetorical tradition in a performative display of practical wisdom."[71] This discussion of a rhetorical tradition relates to the legal concept of stare decisis,[72] where prior decisions of the Supreme Court guide the future decisions of the court as well as the lower courts. Even if a justice or judges believes that the law is bad, precedent binds the court and givers justices and judges the inventional source to decide the decision until the law is changed.

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[68] Thomas B. Farrell, "Knowledge, Consensus, and Rhetorical Theory," *Quarterly Journal of Speech*, 62 (1976): 4. Farrell uses social knowledge to refer to a normative agreement, presumed by communication acts, which generalizes human interests and is applicable to practical questions. See Jürgen Habermas, *Legitimation Crisis* (Toronto: Beacon, 1975). Also note John Murphy relies the quote by Thomas Farrell to discuss the function of rhetorical traditions in the aggregate. See John Murphy, "Inventing Authority: Bill Clinton, Martin Luther King Jr., and the Orchestration of Rhetorical Traditions," *Quarterly Journal of Speech* 83 (1997): 72.

[69] John Murphy, "Inventing Authority," 72.

[70] John Murphy, "Inventing Authority," 72.

[71] John Murphy, "Inventing Authority," 74 - 75. Murphy notes that in an authoritative performance, a speaker adapts the wisdom of the past to the present situation. Further, an authoritative decision "evolves out of the cultural grammar," develops aesthetics principles and shows the community the "appropriate ways to move in the realm of appearances," and requires reflection of the represent to not "degenerate into either uncritical acceptance of custom," (75 – 76).

[72] "To stand by things decided."

In 1910, the Supreme Court decided its first reapportionment case, *Richardson* v. *McChesney* 218 U.S. 487 (1910) and provided the foundation for its rhetorical tradition, arguing for judicial abstinence in the reapportionment and redistricting process.[73] In an unanimous decision, the Supreme Court provided a narrow decision as it argued that the case presented a moot controversy since the challenged elections of 1908 were held, representatives were elected, McChesney was no longer the Secretary of State, and "the thing sought to be prevented has been done, and cannot be undone by any judicial action."[74] By focusing the decision on the narrow, procedural grounds, the Supreme Court avoided the larger issue as to whether or not reapportionment cases were justiciable and decided against providing "judgment upon abstract questions.[75] Though the Supreme Court refused to consider "the question of the authority for judicial interference in respect to congressional apportionment, the Kentucky Court of Appeals decision in the

[73] The facts of the case combine the facts of the Wisconsin and Nevada cases discussed earlier. Charles Richardson filed a suit against H.V. McChesney, the Secretary of State of the Commonwealth of Kentucky, over the Kentucky Act of 1898 and its amendments, which reapportioned Kentucky's Congressional districts. Richardson alleged that this act did not conform to Kentucky's Constitutional standards of apportioning representatives to the States because the districts failed to contain an equal number of inhabitants; further, since the 1898 Act violated the state constitution because of "gross inequality of inhabitants," Richardson alleged that Kentucky should follow the standards set by an act passed in 1882. The Court did not share Richardson's beliefs.

Further, missing from the Supreme Court's decision is the political nature of the controversy. The Court of Appeal of Kentucky's decision provides a glimpse into another distinct social world whereby reapportionment is political in nature. In the Court of Appeals decision, Richardson is a Republican, trying to gain equal representation for the Republican Party, which the reapportionment plan denies. Further, in the Court of Appeal's decision, the Court argued that the reapportionment plan was not "grossly unequal," as the ideal district population would have be 149,881 inhabitants per district and only three of the districts possessed a population over 10% of the average established later by the Supreme Court (368 – 369).

[74] *Richardson* v. *McChesney*, 218 U.S. 487, 492 (1910).

[75] *Richardson* v. *McChesney*, 218 U.S. 487, 492 (1910).

case presented an extensive case against judicial involvement within redistricting, arguing that it is not the duty of the courts to assume the legislative authority, for if it did, there would be no end to that authority, and that he people, and not the courts, secured the rights of the nation.[76] To remedy this violation, it is the responsibility of the people to act and secure proper legislation: "The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fails, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution."[77]

Twenty-two years after it decided *Richardson* v. *McChesney*, the Court decided four reapportionment cases that examined the number and structure of Congressional districts in three states, the meaning of "legislature," the relationship between the states' legislatures and the states' governors, and the interpretation of Congressional intent. On April 11, 1932, the Supreme Court handed down decisions in *Smiley* v. *Holm*, 285 U.S. 355 (1932), *Koenig* v. *Fylnn*, 285 U.S. 375 (1932), and *Carroll* v. *Bcker*, 285 U.S. 380 (1932). On October 18, 1932 the Court handed down its decision in *Wood* v. *Broom*, 287 U.S. 1 (1932). While the Court tried to remain neutral in reapportionment claims to protect the separation of powers, these cases suggest that the Court failed to separate the legal language and authority of reapportionment from the political language and authority of reapportionment. While the Supreme Court can upholds its rhetorical tradition on

[76] *Richardson* v. *McChesney*, 218 U.S. 487, 492 (1910).

[77] *Richardson* v. *McChesney*, 128 KY 363, 368 - 369; 108 S.W. 322 (1908).

abstaining from providing rulings on districting cases themselves, the Supreme Court weakened its authority as it ruled on the validity of the process of creating a districting plan.

Of the first three decisions, the opinion in Smiley provided the only substance as the other two cases deferred to its holding. In each of these three cases, Minnesota, Missouri, and New York faced a change in the number of representatives after the decennial census, with Minnesota receiving two fewer representatives, Missouri receiving one fewer representative, and New York receiving two additional representatives. The issue in these cases concerned how state legislatures developed reapportionment plans when proper reapportionment plans were not in place. In addition, in *Smiley*, the Court faced a question as to whether or not the Minnesota state legislature enacted a valid apportionment plan since the proposed districts were enacted but vetoed by the Governor. In deciding this issue, the Supreme Court declared that Minnesota's redistricting act was unconstitutional since the legislature, which was passed by the legislature and then returned by the governor to the legislature, did not reconsider the bill nor provide it the necessary 2/3 vote to supersede the veto.[78] If, as the Court argued, the Minnesota Legislature engaged in its authority to "make laws," then that authority is subject to the

[78] In its decision, the Minnesota State Supreme Court ruled that when creating the redistricting plan, the Minnesota Legislature acted as an agency under Article 1, 4 of the U.S. Constitution and, therefore, did not create a law subject to the governor's veto. This differs from the commands of the Minnesota State Constitution, which states that the Legislature possesses the authority to make laws but must submit it to the Governor for consideration. After providing a thorough review of the meaning and use of "Legislative" in the U.S. Constitution to rule that the when making laws for the state, the Minnesota Legislature must follow the prescribed rules for the state; hence, it is subject to a Governor's veto. See *Smiley* v. *Holm*, 285 U.S. 355, 363 – 369 (1932).

Governor's veto and, in a system of checks and balances within Minnesota's constitution, the state legislature cannot enact laws without impunity.

In addition to striking down the reapportionment plan on the grounds that the Legislature exceeded its authority, the Supreme Court determined the proper recourse to voting within the states when legislatures failed to develop reapportionment plans and gain or lose representation in Congress as a result of the census. According to the fifteenth decennial census, Minnesota lost one representative; however, since the Court struck down the State's reapportionment plan because the legislative branch ignored the Governor's veto, no plan existed that incorporated one fewer district. Section 4 of the 1911 Reapportionment Act stated that if there were an increase of representation in a State without a redistricting plan in place, the representatives would be elected at an at-large basis, until the state shall be redistricted; in *Smiley*, the court stated that in the absence of new districts, representatives would be elected at an at-large basis, in order to, "afford the representation to which the state is constitutionally entitled."[79]

Six months after it announced its decision in Smiley, The Supreme Court released its decision in *Wood* v. *Broom*, which examined electoral practices in the state of Mississippi.[80] In this decision, the Court reaffirmed that Congress provides the definitive

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[79] *Smiley* v. *Holm*, 285 U.S. 355, 374- 375 (1932).

[80] *Wood v. Broom*, 287 U.S. 1, (1932). According to a 1929 Congressional Reapportionment, the state of Mississippi was allocated seven seats in Congress instead of its previous eight. In 1932, the state legislature passed a redistricting bill creating those seats. A citizen challenged the apportionment plan on the basis that it violated article 1, 4 and the fourteenth amendment as it failed to meet Congressional standards of equal population, contiguity and compactness established in a Congressional redistricting bill in 1911 but omitted in subsequent bills. After reviewing the case, the District Court declared the districts "were not composed of

voice for representation and if Congress failed to include standards of compactness, contiguity, or equal population as nearly practicable, as the Reapportionment Act of 1929 omitted those practices, then those requirements expired with the Reapportionment Act of 1910. The Court stated that, "It was manifestly the intention of the Congress not to re-enact the provision as to compactness, contiguity, and equality in population with respect to the districts to the reapportionment under the act of 1929. This appears from the terms of the act and its legislative history shows that the omission was deliberate."[81] If there were no Congressional standards to violate, then this case failed to raise constitutional standards.

Fourteen years after it provided an authoritative reading of the 1929 Congressional Redistricting Act, the Supreme Court released its decision in *Colegrove* v. *Green*, which presented another redistricting challenge under the 1929 Redistricting Act.[82] Though, as the plurality of Court stated that the decision in *Wood* controlled the actions of the Court in *Colegrove*, the plurality attempted to provide citizens, legislatures, and the judiciary with a definitive interpretation of the Supreme Court's ethos in the

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compact and contiguous territory, having as nearly as practicable the same number of inhabitants." The Supreme Court reversed the decision of the District Court and remanded it back for dismissal, 1 – 7.

[81] *Wood* v. *Broom*, 287 U.S. 1, (1932). Author's note: To clarify its position, the Court traces the history of the bill through both the House and Senate, showing where it passed, where it failed, and what changes were made.

[82] In *Colegrove*, three residents and voters of Illinois challenged Illinois Congressional districts that contained a higher number of inhabitants than other Congressional districts, which violated the Reapportionment Act of 1911 that called for equal population, compactness, and contiguity. In *Wood* v. *Broom*, the Supreme Court refused to overrule the 1929 Reapportionment Act for lacking the three requirements found in the 1911 Act. Previously, the District Court of Northern District of Illinois dismissed this case.

reapportionment and redistricting rhetorical tradition. While the concurring decision by Justice Wiley Blount Rutledge serves as the controlling decision in *Colegrove*, it is the decision of Justice Felix Frankfurter that expounds the Supreme Court's authority in cases that concern "political questions."[83]

Throughout his decision, Justice Frankfurter's argues that the proper characterization of representation, and of a constitutional democracy, depends on legislative supremacy, judicial restraint, and a vigilant people. First, by stating the controlling decision in this case is *Wood* v. *Broom*, he argues that Congress, not the courts, possesses the authority to control the requirements of reapportionment.[84] Additionally, the Court cannot engage in "verbal fencing about 'jurisdiction'" and must remain faithful to its refusal to intervene in certain controversies since "due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determinination."[85] Third, the wrong in this case concerns the polity of Illinois and not individual citizens. If the Supreme Court were to intervene

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[83] *Colegrove* v. *Green*, 328 U.S. 549, 550 - 552 (1946). The Colegrrove decision is a 4 – 3 decision. Justice Robert H. Jackson took no part in this case as he served as the Chief Prosecutor for the United States at the Nuremburg Trials and Chief Justice Harlan Fiske Stone did not join either side in this case before he died on the bench on April 22, 1946 while reading *Girouard* v. *United States*, 328 U.S. 61 (1946). Even as he noted that the complaint was strong, Justice Routledge concurred with the result on prudential grounds as he feared that the "Cure sought may be worse than the disease," meaning he did not desire the responsibility of altering the relations between the judiciary and the state legislatures by forcing the state legislatures into action that they did not want to partake in on a voluntary basis. Further, Justice Routledge believed that there would not be enough time to draft redistricting plans between the time of the Supreme Court's decision and the fall elections and that the alternative of at-large elections would be worse than elections in malapportioned single-member districts.

[84] *Colegrove* v. *Green*, 328 U.S. 549, 550 - 552 (1946).

[85] *Colegrove* v. *Green*, 328 U.S. 549, 552 (1946).

and alter the failures of the Illinois Legislature, the Supreme Court would not be able to remap the state into districts, resulting in state-wide elections, which counters Congressional requirement of single-member districts.[86] Further, this controversy would involve the judiciary in party conflicts, which diminishes the ability of the judiciary to remain neutral and the ability of the people to engage in self-government. "It is hostile," Justice Frankfurter writes, "to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law."[87] Concluding, Justice Frankfurter notes that the Constitution presents a textual solution to this problem and, if Congress fails to act to resolve this problem, then the people must act.

In Justice Frankfurter's view of democracy, the legislative branch must reign supreme and the judiciary must entertain political questions so not to interfere with the ability of the people to provide the reapportionment correction. Justice Frankfurter writes that, "The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress."[88] To do this, it is "the people" that must act as if they have not attempted to act to secure this own their own. By incorporating "the people," Justice Frankfurter creates a system of government that sees unity in the people as well as disunity between the people and the legislature. Yet, the

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[86] *Colegrove* v. *Green*, 328 U.S. 549, 553 (1946).

[87] *Colegrove* v. *Green*, 328 U.S. 549, 553 - 554 (1946).

[88] *Colegrove* v. *Green*, 328 U.S. 549, 556 (1946).

reason for the malapportionment occurs because of the divisions between segments of the population and the control and allocation of representatives with the allocation of representatives reinforcing that division. By stating that the "Courts ought not to enter this political thicket,"[89] and discussing the role of "the people" as the reapportionment corrective, Justice Frankfurter deflects attention away from the control of the state by partisan interests. To assert that "it is hostile to a democratic system to involve the judiciary in the politics of the people," Justice Frankfurter means that it is hostile for the judiciary to assume the power of the legislature, especially the parties in control of the legislature, to select its form and method of representation since "a study of the history of Congressional apportionment is its embroilment in politics, in the sense of party contests and part interests."[90] In this view, representation remains at a social or political right and the ability of citizens to receive representation correlates to their ability to persuade the legislatures to recognize that a certain constituency possesses a desirable interest to the legislature.

To remedy the malapportionment in the state, Justice Frankfurter believes that the people bear the responsibility to persuade the legislature that their cause of interest is important. Yet, without a conception of political equality, not all individuals, groups or interests possess the same importance and those who receive recognition would may not desire to share that recognition. The remedy of "the people" would not be possible as the

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[89] *Colegrove* v. *Green*, 328 U.S. 549, 553 - 554 (1946).

[90] *Colegrove* v. *Green*, 328 U.S. 549, 554 (1946).

malapportionment in the Congressional districts would occur in the state legislative districts and, with the division in the states, Illinois Congressional Representatives would not want other Representatives interfering with the politics in Illinois just as other Congressional Representatives would not want Representatives from Illinois to interfere with the local political of their states. While malapportionment may self-correct over longer, generation shifts, it will not occur because "the people" will tire of malapportionment but rather that the legislature chooses to remedy the situation for political gain. As Justice Black noted in his dissenting opinion, the State Legislature follows an apportionment plan that is similar to the 1901 apportionment and that it is in the interests of the State Legislature, not "the people" to follow the apportionment from 1901.[91] While Frankfurter attempted to reaffirm the ethos of the people, his decision reaffirmed the ethos of the State, which declined to follow the interests of the people.

Consequently, while "the people" serves as an important trope to the psychological power of the meaning of self-government, democracy, or representative government, Justice Frankfurter does not base his decision on the grounds of political equality but rather the idea that political equality is but one of many considerations that legislatures can employ. In *The Least Dangerous Branch*, Alexander M. Bickel expands the reasoning of Justice Frankfurter as he explains that American democracy concerns more than just

[91] *Colegrove* v. *Green*, 328 U.S. 549, 568 (1946).

individuals but interests, groups and regions.[92] Drawing on Justice Frankfurter's decision in *Colegrove*, Bickel writes:

> The principle of equal representation of qualified voters, is surely an aspiration of American democracy, and yet consistently throughout our history, the political institutions have found it necessary or expedient to modify the principle and to represent, not only problem, but interests, groups, and regions. In a diverse federated country extending over a continent, organized as a representative, not a town-meeting, democracy, we strive, after all, not only for responsive, but for truly representative government, which reflects the electorate and is at the same time stable and effective.[93]

Bickel's argument is that citizens and voters matter yet they matter only in relation to other concerns within the Republic such as groups and interests. While designing and fostering deliberative systems that incorporate equality is one goal, the American system relies on the incorporation of competing voices, some of whom play a more vital role through the accumulation of wealth and command of media or persuasion.[94] While Government needs to be responsive to the people, effective government refers to the notion that government is responsive to the most important constituencies within the

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[92] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, (New Haven: Yale University Press, 1962), 192. Bickel notes that decision "does not state that the Court may never interfere with the election process, or that there are no judicially enforceable constitutional principles that apply to elections," (190).

[93] Alexander M. Bickel, *The Least Dangerous Branch*, 192.

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[94] Alexander M. Bickel, *The Least Dangerous Branch*, 193.

state, a notion that only the legislative branch can discern. Consequently, Bickel notes that it's best for the judiciary to defer to the local experts in the legislature who can balance those interests.

For the dissenters in *Colegrove*, the system of American government ought not to be determined before all citizens possess the opportunity to voice their opinion on the matter through elections. Instead of favoring classes of citizens before elections, state government ought to be neutral, at least until all of the citizens possess an equal opportunity to cast their ballot and develop habits of self-government. In his dissent, Justice Black writes that though State Legislatures possess the power to determine the "Times, Places, and Manners" of elections, state legislatures cannot employ that requirement to control and maintain policy decisions by eliminating the voice of all of the people. For the citizens in the malapportioned districts, since the state legislatures perpetuated, for over forty years, the inability to possess an equal voice in government, the state legislature willfully discriminates against them as voters as it creates classes of voters, some of whom possess 1/9th of the representation of other voters.[95] Complicating matters is the fact that there are more districts with smaller population than there are districts with larger population, meaning that legislatures can work together according to their interests to preserve representation in rural areas. If a citizen possesses a vote and if that vote is to count, then, as Justice Black argues, there needs to be a principle of equality

[95] *Colegrove* v. *Green*, 328 U.S. 549, 568 (1946). As Justice Black notes in his dissent, the districts vary in population from 112,000 to 900,000. On its face, the disparity here could not even satisfy an as nearly practicable" standard let alone "equal population" standard.

behind the vote to ensure all votes possess meaning and can influence an election, which means that the fourteenth amendment's requirement that "Representatives shall be apportioned among the several States according to their respective numbers," eliminate a "nation wide "rotten borough" system.[96]

By focusing on the rights of citizens, Justice Black diminishes the meaning of the "political questions" argument, treating it as a slight of hand. Justice Black's dissent sites the Supreme Court's decision of *Nixon* v. *Herdon,* which the declared judiciable question and, as a result, protected a voter's right to cast a ballot in a state primary.[97] Justice Black further attacked the rational of the majority as he mentioned that, in *Smiley v. Holm*, the Supreme Court declared a reapportionment plan invalid as it sorted out the political power of the legislative and executive branches in Minnesota. The point Justice Black's position is that the plurality values the judicial tradition of a "political question" above the constitutional rights of citizens. If a federally protected right, such as the right to vote, were violated by the states or by Congress, then the Supreme Court ought to enter the debate and protect the citizens, who unwillingly surrendered their rights to state discretion. Since the Courts protect other rights dealing with property and liberty, the Courts should step in to decide cases that concern the right of citizens to choose

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[96] *Colegrove* v. *Green*, 328 U.S. 549, 570 (1946).

[97] *Nixon* v. *Herdon*, 273 U.S. 536 (1926). In *Nixon* v. *Herdon*, the Supreme Court declared that a Texas law that prevented blacks from voting in the Texas Democratic Primary violated the fourteenth amendment. In an unanimous decision, Justice Oliver Wendell Holmes stated that the political questions was nothing more than a "play upon words." At the time, the Democratic Party constituted the only competitive party in the state and the exclusions of blacks from the primary meant that those voters possessed no voice in selecting representatives.

representatives that create laws affecting property and liberty.[98] "A state legislature," Justice Black writes, "cannot deny eligible voters the right to vote for Congressman and the right to have their vote counted. It can no more destroy the effectiveness of their vote in part and no more accomplish this in the name of 'apportionment' than under any other name."[99] Even if the Supreme Court were to declare the Illinois redistricting plan invalid, as the Supreme Court did in *Smiley* v. *Holmes*, then the resulting at-large elections would be preferable to these districts as it would allow all individuals the ability to elect candidates on the same political ground rater than being subjected to different political elevations.

Within these seven pre-Reapportionment Revolution cases, the majority of the Supreme Court creates a position that political equality is not essential to the American Republican under the constitution. However, instead of political equality, the legislature must possess the freedom to determine the proper allocation of resources in the state from an assessment of individuals, groups, and interests. As Alexander Bickel notes, the Supreme Court's position in *Colegrove* does not concern the Supreme Court's role in elections or apportionment but that the debate over political equality concerns a political question since political equality is but one of many choices that a legislature must consider as it allocated resources. For the dissenters in *Colegrove*, there is little consistency in the majority's "political questions" doctrine as the Supreme Court protect the right for citizens to cast a ballot, and presumably a meaningful ballot, the Supreme Court struck

[98] *Colegrove* v. *Green*, 328 U.S. 549, 574 (1946).

[99] *Colegrove* v. *Green*, 328 U.S. 549, 571 (1946).

down an apportionment plan prior to *Colegrove*, and that the text of the Constitution requires political equality as apportionment concerns the allocation of representation according to the people. Even with Justice Routledge proclaiming that the facts of the case present themselves as creating a role for judicial intervention, the dissenters failed to persuade him. Leary of entanglement between the two branches, Justice Rutledge would not sign on to judicial intervention in apportionment, providing Justice Frankfurter with a victory. However, this victory, and the first rhetorical tradition for redistricting, lasted until 1960.

In *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), the Court ruled that the 28-sided district, created by the State of Alabama to eliminate "all but four or five of its 400 Negro voters without eliminating white voters," deprived their right to vote, guaranteed by the fifteenth amendment.[100] In his case, the State argued that it possessed the unrestricted power to establish, destroy, or reorganize by contraction or expansion its political subdivisions, to wit, cities, counties, and other local units."[101] It believed that its "political" discretion in redistricting allowed its members to draw lines as it saw fit. As a consequence, the State deprived black residents the ability to vote in municipal elections and to receive the social services from the municipality. While the citizens still possessed

[100] *Gomillion* v. *Lightfoot*, 364 U.S. 364 (1960).

[101] *Gomillion* v. *Lightfoot*, 364 U.S. 364 (1960). By the time the Supreme Court decided *Gomillion*, only three justices who were on the Court in *Colegrove* remained. Of those three, only Justice Frankfurter remained from the plurality.

the right to vote they no longer possessed a right to a meaningful ballot in the municipality in which they lived due to legislative discretion.

What is significant about this case is not the Supreme Court entered this debate, but that the Justice Frankfurter relies on an incorrect Constitutional principle in order to prevent more reapportionment cases, diminishing the Supreme Court's of judicial restraint in regards to the topos of "political questions." Examining the precedent concerning the State and its relations to political subdivisions, Justice Frankfurter notes that the Supreme Court has never acknowledged that the State possesses the unquestioned ability, "to do as they will with municipal corporations regardless of the consequences."[102] If a state does not have the power to evade responsibility with contracts, it does not have the power to do so under the fifteenth amendment, which "forbids a State from passing any law which deprives a citizen of his vote because of race."[103]Further, the defendants in *Gomillion* argued that *Colegrove* affords the Alabama State Legislature the political discretion necessary to create districts free from judicial control; however, Justice Frankfurter differentiates these cases since the state legislators' actions in *Gomillion* features affirmative discrimination through debasement of minority voters and the state legislators' actions in *Colegrove* features passive resistance to reapportion.[104] Accordingly, a

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[102] *Gomillion* v. *Lightfoot*, 364 U.S. 364, 344 (1960). To make his point, Justice Frankfurter reviews the cases that discuss how States alter political boundaries to evade responsibility for contracts. TO review the cases, see 343 – 346.

[103] *Gomillion* v. *Lightfoot*, 364 U.S. 364, 345 (1960).

[104] *Gomillion* v. *Lightfoot*, 364 U.S. 339, 346 (1960).

state legislature can debase votes through neglect and select a group of voters to enhance their representation but a state legislature cannot select a group of voters to dilute their votes. No state possesses the absolute authority to redistrict if it denies representation to citizens and the "advantages that the ballot affords."[105] While state legislative bodies control the redistricting process, the state legislative body cannot deny rights: "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."[106]

Yet, while Justice Frankfurter reached the correct decision, his reasoning about the meaning of a vote in *Gomillion* contradicts the meaning of a right to vote in *Colegrove* in order to defend the Supreme Court's previous reapportionment decision. In *Colegrove*, Justice Frankfurter does not concern his opinion over the meaning of a vote, in particular, but on the right to vote, in general, since the citizens of Illinois could vote though malapportionment diminished the meaning of the ballot for those in urban areas. In *Colegrove*, state legislatures could rely on their discretionary power to diminish the meaning of a ballot for any individual or group if that individual or group did not constitute an important interest for the state or if that interest needed to be counterbalanced by another interest. In *Gomillion*, Justice Frankfurter stated that when a state legislature singles out and isolated a "segment of a racial minority for special

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[105] *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347 (1960).

[106] *Gomillion* v. *Lightfoot*, 364 U.S. 339, 346 - 347 (1960).

discriminatory treatment, it violates the fifteenth amendment."[107] While the Alabama State Legislature certainly denied a racial minority the right to have their vote counted in the district the minority wanted the vote counted, the legislature did not deny the citizens the right to vote, especially in relation to the meaning of the right to vote in *Colegrove*. The problem does not concern voting but of stripping the vote of meaning and excluding the residents of a city from residing in the city and treating groups of citizens in different and unequal manner, which refers to a violation of the fourteenth and not fifteenth amendment.[108] If Justice Frankfurter were to follow the *Colegrove* decision, then he ought to allow the lower court's decision in *Gomollion*, which allows the Alabama State Legislature the discretionary power to redistrict so long as it dies not prevent the citizens from voting. Yet, by rejecting the "political question" argument in *Colegrove*, Justice Frankfurter implies that discretionary power cannot deny the Constitutional rights of citizens and, in terms of apportionment and districting, the constitutional right to vote means the right to cast a meaningful ballot. Yet, this reading of *Gomillion* requires a rejection of *Colegrove* as an authoritative text, allowing the Supreme Court to begin the Reapportionment Revolution.

In *Colegrove* and *Gomillion*, Justice Felix Frankfurter attempts to protect the discretion of the state legislature to engage in redistricting and protect the constitutional rights whose rights have been violated by state legislatures when redistricting and, in the

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[107] *Gomillion* v. *Lightfoot*, 364 U.S. 339, 346 (1960).

[108] *Gomillion* v. *Lightfoot*, 364 U.S. 339, 346 (1960). In his concurring opinion, Justice Charles Evan Whitaker argues that *Gomillion* concerns the fourteenth and not fifteenth amendment though he argues that this switch would not involve the *Colegrove* problem.

balances, lies the meaning of the right to vote and the judiciary's ability to protect that right. In *Colegrove*, Justice Frankfurter establishes that the right to vote and the meaning of a vote is subject to legislative discretion; in *Gomillion*, legislative discretion is subject to the constitutional rights. After reading these decisions, a contrarian would ask Justice Frankfurter why the people in *Gomillion* are not subject to the same standards in *Colegrove* whereby a democracy requires the ability of the people, not the courts, to secure their right to representation from state legislatures. If Justice Frankfurter were to reconcile these decisions, then he would need to show that, while the redistricting in *Gomillion* may have been the result of racial animosity, as the citizens removed from Tuskegee still possessed the right to vote and still possessed the opportunity to petition the state legislators, or Congress, to alter the district back. Conversely, if the result in *Gomillion* were correct, then Justice Frankfurter would need to reconcile the judiciary's role in other reapportionment cases to ensure that citizens in malapportiond districts possessed the right to a meaningful ballot. While Justice Frankfurter would reject this corrective reading of *Colegrove*, a majority of the Supreme Court would support it in *Baker v. Carr*.

Conclusion: The Loss of Authority within the Pre-Reapportionment Revolution Rhetorical Tradition

The purpose of this chapter was to examine the historical constraints and exigencies concerning the Supreme Court's involvement in the Reapportionment Revolution. First, the chapter examines the historical nature of redistricting, establishing that it is a common political tactic though its success and acceptance can vary because of

the size of the population within a district and the presence of partisan tension surrounding a districting. Second, the chapter examines the development of redistricting as a state judicial issue, showing that foundation for the judiciary's involvement into redistricting cases. While not all state courts declared that redistricting presented a justiciable issue, some states courts declared it to be justiciable and struck down apportionment plans even though they violated the political discretion of legislatures. Finally, this chapter examines the Supreme Court's reapportionment and redistricting decisions before the Supreme Court's involvement into this area of law in *Baker* v. *Carr*.

During the pre-Revolution cases, the Supreme Court's decisions relied upon an unstable conception of the "political questions" doctrine as well as presenting contradictory meanings of the right to vote. Before its decision in *Gomillion*, the Supreme Court attempted to protect the legislature's discretion to apportion its representatives though it diminished the ability of citizens to cast meaningful ballots. In *Smiley*, the Supreme Court decided a structural argument between two competing claims of authority, the ability of the legislature to develop a redistricting plan and the ability of a governor to veto a redistricting plan, to declare a reapportionment act unconstitutional. Additionally, the Court relied upon the intent of Congress to invent a judicially manageable standard when determining how to conduct elections when states gain or lose elections, though there was no clear textually referent to determine what happens when states lose representation. In *Wood*, the Supreme Court reaffirmed Congress as the authoritative voice for reapportionment and redistricting as it failed to uphold standards that Congress

decided were no longer necessary to reapportionment and omitted from reapportionment revolution. In *Colegrove*, a plurality declared that political equality was just one of the many choices the legislature faced when it apportioned the state and, for the Court to suggest otherwise, violated the "political questions" doctrine. In each of these cases, the proper remedy to malapportionment belonged to the people and not the judiciary as the judiciary's involvement constituted a threat to the country's democratic system.

However, in Gomillion, the Supreme Court averted that threat as it ruled that there were limits to a state legislature's discretionary power and its was not up to the people to persuade the state legislature to provide them representation. Though the citizens in *Gomillion* possessed the same right to vote and that vote possessed the meaning as the citizens' right to vote and meaning of the vote in *Colegrove*, the Justice Frankfurter's decision suggested that some constitutional rights could not be removed by the legislature. It is in this incongruity that the Supreme Court found rhetorical space to invent its authority to decide apportionment and redistricting cases in *Baker* v. *Carr*.

CHAPTER III

LEGAL AUTHORITY, POLITICAL QUESTIONS, AND POLITICAL RIGHTS: THE ETHOS OF THE SUPREME COURT IN REAPPORTIONMENT

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.[1]

> The Court's authority - possessed of neither the purse nor the sword - ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.[2]

In *Acts if Hope: Creating Authority in Literature, Law, and Politics*, James Boyd White examines the way in which authority "becomes the subject of conscious though and argument."[3] White's work focuses on moments when individuals, whether real or fictional, confront claims of authority and, in response, participates in creating, maintaining, or rejecting authority. White writes, "every speech act is a way of being and acting in the world that makes a claim for its own rightness, which we ask others to respect. Our life with language and each other involves the perpetual creation of

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[1] *Baker* v. *Carr*, 369 U.S. 186, 211 (1962).

[2] *Baker* v. *Carr*, 369 U.S. 186, 267 (1962).

[3] James Boyd White, *Acts of Hope: Creating Authority in Literature, Law, and Politics*, (Chicago: The University of Chicago Press, 1994), ix.

authorities, good and bad, successful and unsuccessful."[4] When facing a claim of authority, examining that claim allows a person to judge the merit of the political and social world as well as accepting, rejecting, or creating anew the language of the political and social world.

In the political and legal culture of the United States, the Supreme Court performs a unique role in determining the meaning, and hence authority, of the Constitution, though this act often removes public controversy from the public realm and relocates within the hands of experts.[5] The legal decisions of the Court are not without political consequence for the public, political parties, and governmental bodies as the decisions will reaffirm or remake the voice of the people as expressed via the legislative branch and reconceptualizes the political process and the way in which citizens participate in civic life. Further, as the Supreme Court alters the framework by which citizens engage one another over the constitution, it also determines the scope of its own authority to determine the extent to which it can participate in Constitutional debate, providing an outline for the judiciary as to what is legal and what is political.

In 1962, The Supreme Court again faced questions about the authority of the judiciary in reapportionment and the authority of its own power, especially in relation to the authority of the other branches of government. In *Baker* v. *Carr*, 369 U.S. 186 (1962),

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[4] James Boyd White, *Acts of Hope*, xi.

[5] David Zarefsky and Victoria J. Gallagher, "From 'Conflict' to 'Constitutional Question': Transformations in Early American Public Discourse," *Quarterly Journal of Speech* 76 (1990): 247

the Supreme Court faced a *Thucydidean moment* that concerned the status of political representation within the United States.[6] For far too long, the state legislature deprived segments of "the people" from participating in civic life and from possessing basic civil liberties. In this decision, the Supreme Court recharacterized the "political questions" doctrine, which provided, for the Supreme Court and the lower courts, theoretical classifications for that which is political and that which is legal. As discussed in the previous chapter, prior to *Baker*, the Supreme Court created a rhetorical tradition for apportionment and districting cases based on the "political questions" doctrine. This tradition of precedents served as an inventional tool that allowed the judiciary to avoid deciding political or partisan issues that they thought the consequences would be too severe for a democratic system of government. Consequently, those who brought challenges to the judiciary would need to look elsewhere for political remedies. Yet, under the authority of Chief Justice Earl Warren, the corruption of representation needed a new, Democratic moment to unlock the promises of the Constitution. To achieve this

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[6] Thomas Gustafson, *Representative Words: Politics, Literature, and the American Language*, 1776 – 1865, (Cambridge: Cambridge University Press, 1992), 1 – 14. According to Thomas Gustafson, a Thucydidean moment concerns the moment at which, "political and linguistic disorders—the corruption of people and language—become one the same." Gustafson basis this concept on J.G.A. Pocok's Machiavellian moment, the "moment in conceptualized time in which the republic was seen as confronting its own temporal finitude, as remain morally and politically stable in a stream of irrational events conceived as essentially destructive of all systems of secular stability. In the language which had been developed for the purpose, this was spoken of as the confrontation of 'virtue' with 'fortune' and 'corruption.'" Gustafson uses the Thucydidean moment to "describe the moment that succeeds the failure of the Machiavellian moment: it is the moment when fortune or necessity or corruption defeats virtue, or when moral and political stability—and the code of language that sustains that stability— collapse into confusion and the muteness of violence. Railing against this collapse, the poet's voice articulates the conditions of this chaos, this fall of words.... This decay of words can no more be avoided than the dropping of leaves and fruit, but in the soil of politics, as well as in the versus of poetry, an unsettling of words, their turning and troping, even their uprooting, can yields something other than rotten diction: it can help produce new growth, new leaves of grass, new conceptions of liberty," 14. See also J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, (Princeton: Princeton University Press, 1975).

Democratic moment, the Supreme Court reaccentuated the rhetorical tradition and reinvented its authority to decide apportionment cases. By reaccentuating the rhetorical tradition, the Supreme Court redefined the "political questions" doctrine and the concept of the judicial restraint behind the doctrine and, consequently, a majority of the Supreme Court and instituted a new set of "good reasons" to allow future Supreme Courts the ability to interpret and read a democratic form of government in the Constitution, returning government to the hands of "the people."

This chapter examines the concept of legal authority that develops through the Supreme Court's entrance in to the reapportionment revolution in *Baker* v. *Carr*. The Supreme Court's decision in *Baker* is a landmark decision as it reconstitutes the foundation for the country legal and political institutions and begins a transformation process during a crisis of representation when the political process could no longer provide political reform for the people. Necessarily in understanding this transformation is the rhetorical invention of authority in the rhetorical tradition guiding apportionment and districting cases. This chapter examines the Supreme Court's rhetoric of authority in *Baker* v. *Carr*. In *Baker,* a plurality of the Supreme Court Justices seeks to reclaim legitimacy in the political process on behalf of "the people." Through an invention and selection of judicial authority, the opinion of Justice William Brennan redefines the scope of judicial power and the jurisprudence of apportionment as a voting right, and, subsequently recharacterizes the relationships between an individual and the political community and between the judiciary and the state legislature. Consequently, because of

the new definitions in judicial power and apportionment, the Supreme Court provides a new vision of law that focuses on the experience of the people rather than the formalistic rules of the Supreme Court. Further, because of Supreme Court's decision to enter an area of law thought to be political, the Supreme Court must structure its own involvement on the basis of a new judicial restraint where it manages a dialectical tension between transferring power to the people and protecting the discretion of state legislatures to be the primary authority of apportionment. I will begin first with a discussion of the development of the political questions doctrine before Baker and a discussion of the social exigence of *Baker*.

Social Context: From Luther v. Borden to Baker v. Carr: The Precedent of the Political Question and the Crisis of Representation

Luther v. *Borden* and the Political Question

In addition to the Supreme Court's decision in *Marbury v. Madison*, the rhetorical tradition of the political question develops from the Supreme Court case of Luther v. Borden, 48 U.S. 1, 40 (1849). While issue before the case concerns whether or not a civil magistrate improperly arrested a Rhode Island citizen, the case developed in the context of an attempted political revolution. In January of 1841, political dissidents under the leadership of Thomas Wilson Dorr attempted to take seriously the ideas of the Declaration of Independence as they instituted a political revolution against the Rhode

Island state government because of diminished voting rights within the state.[7] Without any hope of political reform as the Rhode Island General Assembly refused to expand voting rights and hold a constitutional convention, the political dissidents decided to run for office, and when they could not get enough support to receive a majority of seats in the General Assembly, they called their own constitutional convention outside of the "proper forms of law."[8] After ratification, the people elected their own representatives under the "People's Constitution." however, the Rhode Island General Assembly refused ailed to acquiesce its offices and refused to turn over public records and the state's arsenal.

Rather than acquiesce, the General Assembly refused to turn over public records and the state's arsenal, defined the dissidents' actions as treason, enacted martial law to isolate Luther, Dorr, and their "deluded adherents," and asked citizens to support civil authorities in their search for the rebels. The authorities under the General Assembly

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[7] According to Orville J. Victor, while the beginning of the 19th century roughly saw 75% of the adult male freeholders with the ability to vote, that number decreased to under 50% by the 1830's in order to diminish the voting strength of the rising classes manufacturers and immigrants. By the time of the rebellion, the State Legislature prevented two-thirds of the people from voting and refused to extend the right to vote or alter the original charter. Orville J. Victor, *History of American Conspiracies: a Record of Treason, Insurrection, Rebellion, & Andc, in the United States of American, from 1760 to 1860*, (Ann Arbor: University of Michigan Library, 2006), 449.

[8] Marvin E. Gettleman, *The Dorr Rebellion: A Study in American Radicalism 1833 – 1849*, (Huntington: Robert E. Kreiger Publishing Company, 1980), 28. After gaining some popular support for electoral reform in the beginning of the 1840s, the Rhode Island Suffrage Association enacted a constitutional convention and drafted a constitution that the people of the state, i.e. white freeholders and non-freeholders, would put to a vote. In January of 1842, elections results showed that of the 20,000 citizens of the states who were eligible to vote, 13,947 endorsed the People's Constitution; further, 4,925 of the 8,000 approximate freeholders who were eligible to vote under existing Rhode Island voting landholder requirements voted in favor of the People's Constitution. From these results, it appeared as if the citizens of the state favored and enacted revolutionary reforms. After the ratification of the People's Constitution, the people of the state elected officials, including William Dorr as governor. Governor Dorr claimed that he would take control of the State through the use of force if necessary, as exemplified by his attempt in May of 1842 to capture the state's arsenal in Providence.

found Luther in his home, arrested him, and damaged his home. With no other political recourse available, Luther attempted to carry out the political revolution through legal means as he sued Borden, claiming the arrest was illegitimate as the original Charter of 1663 was no longer the constitution of the state after the people enacted the People's Constitution. In 1848 the legal challenge reached the Supreme Court and, in January of 1849, the Supreme Court relied on the political questions doctrine to decide *Luther* v. *Borden* and precluded Luther and Dorr's desire for fair representation it was not the province of the judiciary to entertain political questions.[9]

Faced with the political reality of having two competing forces acting as the proper authority of Rhode Island and no desire to determine which group possessed the correct claim, and the Supreme Court decided that the case constituted a political question and the judiciary possessed no authority to determine what constituted a Republican form of government. By refusing to decide, the Supreme Court reaffirmed the authority of the Circuit Court and the General Assembly of Rhode Island, and declared that Congress or the President, but certainly not the judiciary, possessed the Constitutional authority to

[9] *Luther* v. *Borden*, 48 U.S. 1, 40 (1849). The issue before the Supreme Court was whether or not Borden trespassed on Luther's property when Borden's subordinates sought to arrest Luther. However, if the Court were to answer this question, it would have been necessary to answer the larger question of which man, Luther or Borden, represented the legitimate government in Rhode Island. If the Charter Government constituted the legitimate government, then Borden possessed the power to arrest Luther for his rebellious and treasonous acts. If the charter government was voided by the People's Constitution, then Martial Law could not have existed and Borden trespassed provided there were a law against trespassing. Further, if Luther's party was the correct sovereign, then Luther would have no legal recourse through the judiciary since the state courts of Rhode Island would have been voided along with the Rhode Island Constitution. If there were no constitution, then the state court would possess no authority to hear a case or issue a decision. Even though "the people" of Rhode Island chose a new form of government, "the people" lacked the institutional authority to enact that political change.

declare the meaning of a Republican Form of Government. Writing for the majority, Chief Justice Roger B. Taney stated, "It is the province of a court to expound the law, not to make it," and, if the Supreme Court were to determine which voters could vote would usurp the constitutional power of the states to determine who could and could not receive political privileges.[10] Under this narrow conception of judicial restraint, the Taney Court determined that the people must seek relief through the proper political bodies, such as the state legislature, Congress, or the President.

The significance of the Supreme Court's decision in *Luther* is threefold. First, the legal legacy of *Luther* v. *Borden* rests with the idea that the judiciary does not possess the authority to expound the meaning of the Guaranty clause of the constitution as only elected political officials determine this clause. Subsequently, the Court's opinion in *Luther* created the notion that portions of the Constitution were not reviewable by the judiciary regardless as to whether or not governmental bodies followed the constitution or government or the people diminished the rights of political, numerical, or racial minorities. Further, this decision allowed future Supreme Courts to declare that other clauses of the Constitution were off-limits to review as the judiciary would be powerless to interpret, an argument that Justice Felix Frankfurter made in *Colerove* v. *Green*. Under stare decisis, once one Supreme Court adds to the rhetorical tradition of the Court's

[10] *Luther* v. *Borden*, 48 U.S. 1, 41 (1849). Justice Taney also remarked that the Court did not possess the knowledge to know who was or was not a qualified voter, how many freeholders there were, and that the Court did not possess the power to conduct a census and determine this information. Further, since there was no evidence, the result of the case would depend on testimony of witnesses, some credible and some not, some favorable to the plaintiffs and some favorable to the defendants. Since a verdict could not be used as evidence to one party over the other, there could be no resolution.

jurisprudence, this provides future justices with reasons to decide or reasons to ignore a controversy.

Second, in *Luther*, the Supreme Court expounds further the dissociation between what is legal and what is political, especially as it relates to who possesses the authority to decide the boundaries between what is legal and what is political. In both the majority opinion and the dissenting opinion, a political question concerns the power to determine who is the proper authority or sovereign, and how the sovereign chooses the form of government. According to Justice Woodbury in his dissent, political questions relate to the fundamental values of society before they enter the Constitution or develop into public law. Once these issues are in the constitution or on the public record, then those issues become legal norms by which the judiciary decides controversies, if those controversies are brought to them. Politics, Justice Woodbury writes, belongs to "the people" and their representatives and that constitutions and laws precede the judiciary, meaning that the issue of whether or not the old charter of Rhode Island was the valid law was out of the hands of the Court since it could not be discerned through a legal principle.[11] The judiciary acts as a mediator between the people and their legislature to check the power of the legislature and is subordinate to the people.[12] But before they can act, the institution, such as the Republican form of government, must be in place.[13]

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[11] *Luther* v. *Borden*, 48 U.S. 1, 51 (1849).

[12] *Luther* v. *Borden*, 48 U.S. 1, 53 (1849).

[13] In a dissenting opinion, Justice Woodbury claims that the power of the judiciary begins after the political bodies act: Let the political authorities admit as valid a constitution made with or without previous

The third lesson of *Luther* v. *Borden* is that political reform develops only if a recognized authority extends the right to an outside collective. Though the rebels possessed the support of the people, the state refused to grant the dissidents access to the political institutions they sought. If the "legal" and "authoritative" political bodies were unresponsive to the needs of the people, then another branch of government would need to provide a legal remedy to a political solution if the judiciary could view the problem as a legal problem. Without any discursive means to alter society, dissidents possess the opportunity to carry out a revolt through violence if they possess the political will to enact violence.

In its best light, the Court's decision shows that there are limitations of the judiciary's power and authority, and system of governments work best when the judiciary adheres to this limitation, especially if controversies relate to the powers of the coordinate branches of government, the powers of the state, or the powers to determine who is an

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provision by the legislature, as in the last situation Tennessee and Michigan were introduced into the Union.... Let the collected will of the people as to changes be so strong, and so strongly evinced, as to call down no bills of pains and penalties to resist it, and no arming of the militia or successful appeals to the general government to suppress it by force, as none were in some cases abroad as well as in America, and one recently in New York, which might be cited beside those above.... In short, let a constitution or law, however originating, be clearly acknowledged by the existing political tribunals, and be put and kept in successful operation. The judiciary can then act in conformity to and under them. Then, when the claims of individuals come in conflict under them, it is the true province of the judiciary to decide what they rightfully are under such constitutions and laws, rather than to decide whether those constitutions and laws themselves have been rightfully or wisely made. While he believes that determining who the proper sovereign is not the province of the judiciary, he dissents over the implementation of Martial Law, stating that the State possessed no power to institute Martial Law since Martial Law relates to wartime and Congress, not the States, possess the power to declare war. Rather than avoid this issue, Justice Woodbury declares that even though determining who is sovereign is a political question, the issue of Martial Law is not because it is a constitutionally declared power to Congress and not the states. Therefore, this power can be checked and it is imperative that the Court checks the power. This distinction between the unwritten political power and the written law provides some guidance to the development of political questions *Luther* v. *Borden*, 48 U.S. 1, 55 (1849).

authority in the state. Consequently, the people and the government need the opportunity to act before the judiciary can step in to rule on those actions. At its worst, the Supreme Court still decided who possessed the political authority in the state as it reaffirmed the power of the Rhode Island General Assembly, it placed the political power in the hands of the states rather than the people, and, further, it refused to define the limitations of the judiciary as it passed responsibility of adjudication to another branch of government. Because of this, the people possessed fewer rights, especially if their viewpoints conflicted with the viewpoints of the states. Consequently, what is political may not be desirable for the majority of citizens, leaving the majority of people with little to no recourse, except as Justice Woodbury states in his dissent, as what occurred in the English revolution of 1688 or the American Revolution of 1776.[14]

Baker v. Carr and the Crisis of Representation

In October of 1953, President Dwight Eisenhower appointed a new Chief Justice to the Supreme Court of the United States, the former Governor of California, Earl Warren. While President Eisenhower announced that he would appoint a conservative justice to fill the seat of former Chief Justice Fred M. Vinson, the president's appointment failed to fulfill this goal. Because of Chief Justice Warren's decisions and political views, President Eisenhower proclaimed after the Supreme Court's decision in *Brown* v. *Board of*

[14] *Luther* v. *Borden*, 48 U.S. 1, 55 (1849).

Education that the appointment of Earl Warren was, "the biggest damned-fool decision" he made.[15]

With his appointment to the Supreme Court, Chief Justice Earl Warren ushered in the new era for political and civil rights, especially related to advancement of individual rights. Cases under the Warren Court such as *Brown* v. *Board of Education*, *Miranda* v. *Arizona*, *Gideon* v. *Wainwright*, and *Engel* v. *Vitale*, sought to protect individual freedoms from the usurpation of the state and the community in such areas as public segregation, criminal law, legal representation, and establishments of religion. Yet, the advancement of individual civil and legal rights faced criticism, especially in the Southern States. As individuals gained rights, southerners feared the loss of state sovereignty and the encroachment of federal power into their peculiar lifestyle. To counter-act the development of the "Rights Revolution" in *Brown*, *Bake v. Carr*, and *Reynolds v. Sims*, some southern citizens advocated for the impeachment of Earl Warren on billboards throughout the South. It is in this political and social context that the political rights of individuals in the reapportionment cases are best understood.

In *Baker* v. *Carr*, the concepts of authority and legitimacy are paramount as they intertwine as the judiciary and the legislature determine the meaning and scope of representative government.[16] Because of the judicial commitment to the rhetorical

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[15] David Nichols, *A Matter of Justice: Eisenhower and the Beginning of the Civil Rights Revolution*, (New York: Simon & Schuster Adult Publishing Group, 2007), 91.

[16] Authority, in these cases, refers to which body, either political or legal, possesses the power to determine what representation—via the creation of electoral districts—should mean to that states and the citizens of the states. Legitimacy develops in regards to the consequences of the authority, especially in how either the

tradition in favor of upholding the "political questions" doctrine, the states faced a crisis within representation as the political bodies developed a system of representative government that appeared illegitimate for the majority of citizens within certain states. The concept of consent of the governed, or of Lincoln's "of the people, by the people, and for the people," seemed antiquated under the pre-Baker apportionment plans.

According to the facts of *Baker*, the urban citizens of Tennessee faced a crisis in representation due to legislative entrenchment and an institutionalization of political rule by the rural representatives and their constituencies. In 1901, the State of Tennessee reapportioned its electoral districts in accordance with the decennial census of 1900. Sixty years and five decennial censuses later, the state of Tennessee employed the same electoral districts for its apportionment, regardless of the changes in population that occurred over time. In 1901, the population of Tennessee was 2,020,616, of whom 487,380 were eligible voters; in 1961, the population reached 3,567,089, of whom 2,092,891 were eligible to vote.[17] With the increase of variance in population and with the absence of reapportionment, districts featured extreme variations in voting population. Moore County contained 2,340 voters and elected one representative; Shelby County contained 312,345 voters and elected seven representatives.[18] The disparities in voting allowed 37% of the qualified voters to elect 20 of the 33 members of the Senate while the remaining

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political or legal bodies enact representation. While authority concerns who possesses the power to act, legitimacy concerns whether or not institutions work correctly or constitutionally.

[17] *Baker* v. *Carr*, 369 U.S. 186, 192 (1962).

[18] Phil C. Neal, "Baker v. Carr: Politics in Search of the Law," *The Supreme Court Review* 1962 (1962): 253.

63% of the qualified voters elected 13 members; for the State's House of Representatives, 40% of the population elected 63 members while 60% of the voters elected only 36 members.[19] In effect, the institutional form of representation in place allowed the few to rule over the many and presupposed that the many were incapable of rule while it presupposed that the few always acted wisely on the behalf of the state.[20]

The problem of inequality extended beyond electoral representation as it altered distribution of goods and services throughout the community. In addition to the diminished weight of their vote and a diminished ability to elect representatives of their choice, the appellees argued that those in over-represented areas received a greater distribution of state funds, especially for the support of the public schools, the maintenance of roads and highways, and the distribution of county aid.[21] Further, because

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[19] *Baker* v. *Carr,* Brief for Appellants, 369 U.S. 186 (1962).

[20] Howard Ball, *The Warren Court's Conception of Democracy: An Evaluation of the Supreme Court's Apportionment Decision*, (Rutherford, Fairleigh Dickinson University Press, 1971), 51.

[21] *Baker* v. *Carr,* Brief for Appellants, 369 U.S. 186 (1962). According to the Brief, the Appellants argue, "Laws 1959 ch. 14, House Bill 123. in providing for a distribution of revenues collected in support of the education system of the state, exempts the over-represented counties from application of the formula for contribution to their own county educational needs required of the under-represented counties where applicants live, but nevertheless guarantees the exempt counties school funds in amounts previously paid to them by the state." Furthermore, the inequities in population altered the use of highway funds. According to the appellees brief, "Similar discriminatory results have occurred in respect to highway improvement. Of the seven cents collected by the state for the storage and sale of each gallon of gasoline, two cents is paid into a separate fund known as County Aid Funds". Notwithstanding that said funds are derived from the consumption of gasoline one-half of the fund is distributed equally among the ninety-five counties of the state, one-fourth is distributed among the ninety-five counties on the basis of area, and only the remaining one-fourth is distributed among the counties on the basis of population. Finally, the inequity in population skewed also county aid fund: "In the 1957-1958 apportionment of the county aid funds, the General Assembly permitted 23 counties to receive 57.9% more state aid than would be the case on a basis of state aid per capita, and it turns out that these counties had 23 more direct representatives than permitted under the state constitution. Ten counties, having 25 less direct representatives than required by the Tennessee Constitution,29 among them Shelby, Knox, Hamilton, and Davidson, received 136.9% less state aid than on a per capita basis. Expressed another way, a voter in Moore County (with a voting population in 1950 of

the conservative rural areas of the state dominated the legislature cultural differences became legal differences as urban and metropolitan areas were unable to seek legislative solutions to overturn the state's prohibition on teaching evolution within pubic schools and the state's prohibition on allowing bars and nightclubs within the counties.[22] Since the representatives of the state refused to reapportion in order to preserve their power, citizens resided in an area where the few controlled the many. The malapportionment problem extended beyond Tennessee as only Nevada's Senate possessed a deviation of less than 10% from the ideal size as the rest of the states contained deviations greater than 10% of the ideal.[23] In 44 states, less than 40% of the state's population could elect a majority of the elected representatives.[24]

Frustrated with the lack of change of and by the state legislators, voters initiated democratic revolutions to secure representation; however, the representatives were unwilling to allow reform. According to the appellants, reapportionment bills failed to gain support by representatives as no bill for reapportionment received more then 13 votes in the Senate and no more than 36 votes in the House.[25] Other remedies failed as well.

2,340) has 17 times as much representation in the lower House as does a voter in Davidson County (1950 voting population 211,930), and Moore County receives 17 times the apportionment per vehicle of state gasoline taxes as does Davidson county." See brief, pages 12 – 13.

[22] Howard Ball, *The Warren Court's Conception of Democracy,* 94.

[23] "Legislative Districts in the Fifty States," *The New York Times,* 28 March 1962 p22.

[24] Clayton Knowles, "Study Details Rural Domination of Most Legislatures in Nation," *The New York Times*, 28 March 1962 p22.

[25] *Baker* v. *Carr,* Brief for Appellants, 369 U.S. 186 (1962).

Governors campaigned over the issue of reapportionment but could not secure it because of the legislature; a Constitutional Convention was not available since a convention could only be called for by two successive General Assemblies; furthermore, even the Tennessee Supreme Court "sealed the door of the legislature by holding that is it were to declare the Act of 1901 unconstitutional, it would deprive the state of its legislature and bring about the destruction of the state itself."[26] Since, as the appellants argued, it was no longer reasonable for those in power to relinquish the power, the only recourse was to petition the federal judiciary.

Baker developed on appeal from the Federal District Court in Tennessee. In the lower court's decision, the District Court reflected the view that the appellees presented a violation of constitutional rights and the district court recognized that a violation of constitutional rights were alleged, however, the Court exposed its "impotence to correct that violation."[27] The Court reasoned that while the citizens and voters of Tennessee possess certain rights, the district court, as a division of the judiciary, could not provide a remedy since, "it has long been recognized and is accepted doctrine that there are indeed some rights guaranteed by the Constitution for the violation of which the courts cannot give redress."[28] Yet, in its decision, the Distinct Court interpreted the "long accepted"

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[26] *Baker* v. *Carr,* Brief for Appellants, 369 U.S. 186 (1962).

[27] *Baker* v. *Carr*, 369 U.S. 186, 197 (1962).

[28] The District Court stated, ""With the plaintiffs' argument that the legislature of Tennessee is guilty of a clear violation of the state constitution and of the rights of the plaintiffs the Court entirely agrees. It also agrees that the evil is a serious one which should be corrected without further delay. But even so the remedy in this situation clearly does not lie with the courts. It has long been recognized and is accepted doctrine that

doctrine in a way that varied with Chief Justice John Marshall's initial discussion of that tradition, especially as it related to the individual rights of citizens. The Supreme Court noted probable jurisdiction in October of 1960.

According to Chief Justice Earl Warren, the Supreme Court's decision in *Baker* decisions was the most important decision during his tenure on the Court, even more important than *Brown* v. *Board of Education* because the Court introduced political reform when the prospects of reform seemed hopeless.[29] Rhetorically, the Supreme Court's challenge in *Baker,* and the other cases of the Reapportionment Revolution, was two-fold: first, it needed to invent its authority to decide reapportionment cases and, second, to discern a legal solution to a problem that the political process could not solve or the political bodies refused to solve. By accomplishing this task, the Supreme Court would reinvent its authority and reexamine prior decisions without overturning precedent, develop its authority in response to the lack legitimacy exemplified by the State Legislature, and return legitimacy to the electoral process by discerning a way to break legislative entrenchment and force the legislative bodies to act while it reaffirmed the legislature's role in enacting reapportionment.

During its deliberation, the Supreme Court remained deeply divided over the resolution of the case. The Court first heard arguments in April of 1960; after failing to

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there are indeed some rights guaranteed by the Constitution for the violation of which the courts cannot give redress," *Baker* v. *Carr*, 179 F. Supp. 824, 828 (1959).

[29] Abner J. Mikva, "Justice Brennan and the Political Process: Assessing the Legacy of *Baker* v. *Carr*," *University of Illinois Law Review* (1995): 685.

reach a decision, the parties reargued the case to the Court in October of 1961.[30] Chief Justice Warren believed that because of continued judicial restraint in apportionment, political inequalities festered and encouraged further malapportionment, making alterations in the political process hopeless for the people.[31] The dissenters in *Colegrove*, Justices Douglas and Justice Black, sided with Justice Brennan and Chief Justice Earl Warren, believing *Gomilion*, and not *Colegrove*, controlled *Baker*.[32] Justices Frankfurter, Harlan, Clark and Whittaker favored affirmation of the lower Court's decision that held reapportionment was a political question. Knowing tension existed between the justices on the question of the Supreme Court's involvement, Chief Justice Warren attempted to preserve his coalition through the selection of the justice to write the opinion. At first, Warren contemplated assigning the decision to Douglas, who wanted a sweeping decision for Court involvement, and then looked to a wavering Stewart, who wanted a narrow opinion.[33] Yet, fearing that Douglas would write in such a way that would cause Douglas or Black to break from the majority, Warren turned to Brennan to hold the coalition together. [34] After the initial drafts, Warren stepped in to preserve his coalition as Justice

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[30] Luis Fuentes-Rohwer, "Baker's Promise, Equal Protection, and the Modern Redistricting Revolution: A Plea for Rationality," *North Carolina Law Review* 80 (2002): 1362

[31] Jim Newton, *Justice for All: Earl Warren and the Nation He Made*, (New York: Riverhead Books, 2006), 389 – 390.

[32] Luis Fuentes-Rohwer, "Baker's Promise, Equal Protection, and the Modern Redistricting Revolution," 1362.

[33] Jim Newton, *Justice for All,* 390.

[34] Jim Newton, *Justice for All,* 390.

Douglas and Stewart threatened to bolt to the minority. Justice Stewart, a possible swing vote in the case, sided with reversal of the lower court's decision only after he read and agreed with the decision of Justice Brennan.[35]

The decision ended as a plurality 6 –2 decision, as Justice Clark and Stewart agreed to the holding but for different reasons[36] and Justice Charles Evans Whitaker recused himself from the decision as he suffered a nervous breakdown agonizing over this decision.[37] Justice Clark's switch remained the most curious move. Originally, he believed that voters failed to explore all available avenues to challenge the reapportionment, such as "invok[ing] the ample powers of Congress;" however, Justice Clark changed his mind in

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[35] Luis Fuentes-Rohwer, "Baker's Promise, Equal Protection, and the Modern Redistricting Revolution," 1362

[36] In *Baker*, the Supreme Court declares that reapportionment is justiciable but does not overrule the prior cases that state reapportionment was not justiciable nor does it provide guidelines for lower courts to decide apportionment cases as it remands the decision back to the lower courts for further proceedings in line with this decision. The Supreme Court's opinion features a plurality decision by Justice William J. Brennan, which examines the Court's authority to hear reapportionment and outlines the political questions doctrine; a concurrence by Justice Goulas that argues the Supreme Court never declared apportionment as being "beyond judicial cognizance," and argues the judiciary can enter the debate to examine whether or not the states engage in invidious discrimination; a concurring opinion by Justice Clark that that the Tennessee legislature engages in discrimination of certain citizens through the design of its districts or, as Clark refers to them as "crazy quilt without rational basis," and, as a result, prevents the citizens from correcting the discrimination through the electoral process; a dissent by Justice Felix Frankfurter and a dissent by Justice Harlan, both of which attack the Supreme Court for interfering with the precedent of the Court and for interfering with the other branches of government, the state legislatures, the people, and the delicate balance of federalism.

[37] According to Jim Newton, Chief Justice Warren and Justice Frankfurter placed tremendous pressure on the Justices for their vote and, consequently, Justice Frankfurter "scorched the Earth" after his defeat, trashing the wavering Whitaker and breaking him under the strain. Whittaker, who suffered from depression exacerbated by the stress on the Supreme Court, visited Walter Reed Medical Center where his doctors warned him of his health. He stepped down from the Supreme Court on April 1, 1962. See Jim Newton, *Justice For All*, 391 – 392.

the process of writing a decision.[38] In a letter to Justice Frankfurter, Justice Clark concluded:

> Preparatory to writing my dissent in this case, along the line you suggested of pointing out the avenues that were open for he voters of Tennessee to being about reapportionment despite its Assembly, I have carefully checked into the record. I am sorry to say that I cannot find any practical course that the people could take in beginning this about except through the Federal Courts.
>
> Having come to this conclusion I decided I would reconsider the whole case, and I am sorry to say that I shall have to ask you to permit me to withdraw from your dissent. I regret this, but in view of the fact that the voters of Tennessee have no other recourse I have concluded that this case is controlled by MacDougall.[39]

Before switching sides to join the majority, Justice Clark told Justice Frankfurter that his "dissent was unanswerable…. As you suggested by telephone I will prepare something on failure to exhaust other remedies….[After discussing a trip and returning] In light of the waiting period Tenn. Has already experienced, I hope my delay will not too long deprive it of a constitutional form of gov[ernment], i.e. control by the 'city slickers.'"[40] By switching, Justice Clark agreed to transfer authority from the state to the people by invoking the

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[38] Luis Fuentes-Rohwer, "Baker's Promise, Equal Protection, and the Modern Redistricting Revolution," 1362.

[39] Tom C. Clark, "Letter to Justice Felix Frankfurter," 7 March 1962 available at *The Papers of Justice Tom C. Clark* http://utopia.utexas.edu/explore/clark/view_doc.php?id=a120-02-02.

[40] Tom C. Clark, "Case Files: Daft of Justice Frankfurter dissenting Opinion in Baker Case" 2 February 1962 available at *The Papers of Justice Tom C. Clark:* http://utopia.utexas.edu/explore/clark/view_doc.php?id=a119-05-03.

judiciary and not Congress. Congress would have been unable to help since the states possessed the power to redraw the lines for state and federal elections. If the states were unwilling to redraw lines for the people of the state, why would they redraw the lines for the people of the nation? As Justice Clark noted, the authority of the states prevented the individuals of the state to secure representation.

Justice Clark's memorandum to Justice Frankfurter exemplifies why the authority of precedent no longer applies to the reapportionment cases. In *Acts of Hope*, James Boyd White writes that, "to be complete and effective the legal argument must claim that the law and justice coincide."[41] In *Colegrove*, the state legislature of Illinois failed to reapportion its congressional districts for over forty years; in *Baker*, the state legislature failed to reapportion for over sixty. When citizens challenged the inaction of the legislatures through the judiciary, the judiciary asked "the people" to find a remedy with the legislative branches. Unable to find a legislative remedy, the people possessed no recourse, diminishing the authority of the Supreme Court's remedy. The people can act only if there are avenues in which to act, yet, because of the legislature, there were no remedies to act, returning the controversy to the Supreme Court though this time new justice to the court provided a different remedy.

The Authority of the Supreme Court: The Source and Vision of the Law

In *Baker*, the Supreme Court Justices contest the ground for judicial involvement into apportionment and district through the selection and rejection of authority. For the

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[41] James Boyd White, *Acts of Hope*, 170.

dissenters in *Baker*, the way in which the judiciary provides meaning to representation is to follow the traditional and proper forms of judicial action, which means that the authority rests within the hands of the state legislatures or Congress and the judiciary participates only in so far as it exemplifies judicial restraint. To reinforce this set of beliefs, the dissenters rely on conceptions of authority that respect prior precedent, forewarns of future action, exemplifies restraint, as well as respecting the authority of the other branches of government as well as the people. When doing this, the rhetorical style the dissenters employ is to amplify each argument to signify that an encroachment in to one area of law allows for an usurpation of all relevant powers and all areas of law on which basis the judiciary possesses no authority. Yet, the way in which the dissenters argue against judicial involvement and the way in which the dissenters argue for judicial restraint creates an incongruity with the process of representation. As the dissenters argue for a process of self-correction, it perpetuates a system whereby self-correction will not occur. While the dissenters lament the advancement of judicial discretion in apportionment, the majority of justices create the discursive space to enter this area of law through the rhetoric of definition. By defining the scope of judicial power and redefining apportionment under a new type of law, the majority of justices alter the relationship between the individual and the state as well as the relationship of the state to the federal government, allowing for greater judicial checks and balances on the political process.

Respecting the Past and Fearing the Future

Justice Felix Frankfurter opens his dissent by challenging the decision-making of the judiciary for disregarding the relevant precedent concerning reapportionment and redistricting. The Justice writes that the Court "reverses a uniform course of decisions established by a dozen cases," and the "impressive body of rulings thus cast aside reflected the equally uniform course of our political history regarding the relationship between population and legislative representation— a wholly different matter from denial of the franchise to individuals because of race, color, religion or sex."[42] Concerning *Colegrove*, Justice Frankfurter writes that the two opinions that speak for the majority of the seven sitting justices reaffirm the holding that "considerations were controlling which dictated denial of jurisdiction"[43] of these types of cases, though Justice Frankfurter fails to note that Justice Routledge's concurrence argues for a willingness to intervene if there is enough time for a remedy.[44] This omission symbolizes the unstable argumentative ground on which the decision rests as Justice Frankfurter prefers that the justices follow precedent for precedent's sake, without determining whether or not the precedent remains viable due to empirical conditions with the malaaportionment of representation or that precedent is correct as a matter of law or ethics. Justice Frankfurter relies on a reverence for wisdom of the past rather than the partiality of the present to provide citizens and governments the clarity to develop a functioning government. Justice Frankfurter believes that if the

[42] *Baker* v. *Carr*, 369 U.S. 186, 267 (1962).

[43] *Baker* v. *Carr*, 369 U.S. 186, 277 (1962).

[44] *Colegrove* v. *Green*, 328 U.S. 549, 566 (1946).

decisions were wrong and the judiciary erred, then it is the duty of the people to act through their legislature to correct the decision.

Behind his words, Justice Frankfurter presents a claim that the personal views that the Justices hold on issues such as reapportionment must remain subordinate to the Constitutional rulings of the Supreme Court as a whole and overtime. This serves as a stark reminder to the justices serving presently on the court that if they allow their personal views to decide cases, the future justices will do the same, removing the clarity and impartiality from the law. If the body of law were to change from justice to justice and generation to generation and the judiciary itself would not longer follow the mandates of the law, there is not reason why the other branches of government at the state or federal level would follow the law. Any deviation from what has been said represents the fear of Justice Frankfurter over why the judiciary should stop deciding apportionment and districting cases since state and federal justices, if they do not ground themselves in restraint, could institute their judgment for the legislature, acting as a super-legislature for all political policies, diminishing the need for the people or for the legislature. To retain authenticity, the Supreme Court must follow precedent and follow its "unwilling to intervene in matters concerning the structure and organization of the political institutions of the States," especially when broad federal guarantees such as "equal protection" overrule state powers.[45]

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[45] *Baker* v. *Carr*, 369 U.S. 186, 284 (1962).

In addition to accepting considerations of the past to avoid discretions in the present, the dissenters reject the Supreme Court's decision in *Baker* because of prudential considerations of the future. While, Justices Frankfurter and Harlan refuse to provide moral or substantive claims about the status or legitimacy of representation, they provide these claims about the actions of the judiciary. While these justices may or may not believe that the malaaportionemnt is a concern, they argue that involving the judiciary leads to unknown consequences that are much worse in principle than what is known now from consequence. If the federal courts or the Supreme Court lacks knowledge about the state and possesses the ability to create or judge reapportionment and redistricting plans, then the court will not only possess expansive power but it will possess expansive power that altering the social contract between legislators and citizens. As Justice Harlan declares, *Baker* concerns, "the right of a State to fix the basis of representation in its own legislature,"[46] while Justice Frankfurter argues as a result of the plurality's decision in *Baker*, the Supreme Court "empowers the courts of the country to devise what should constitute the proper composition of the legislatures of the fifty States," and, if the state courts are unable to fulfill the duty, then the federal courts must.[47] In addition to the relationship between the citizen and the state, *Baker* the interplay between Republicans and Democrats for the control of the Tennessee state government and the ability of the legislature to use its discretion to allocate appropriate resources. If and when the judiciary

[46] *Baker* v. *Carr*, 369 U.S. 186, 331(1962).

[47] *Baker* v. *Carr*, 369 U.S. 186, 269 (1962).

interferes, even to require the states to employ political equality in redistricting, the consequence will be the reconfiguration of almost all aspects of politics at the local level.

Once the Supreme Court wills itself the authority to reconfigure one aspect of representation, there is no principled reason to resist further usurpation. Once the Supreme Court rejects its long-standing decisions in this area of law then the Supreme Court can will itself the authority to provide any answer to a legal or political question even is it alters the configuration of state government or concerns an area of governmental action that the judiciary does not possess the proper virtues to understand. Justice Frankfurter writes that, "the crux of the matter is that courts are not fit instruments of decision where what is essentially at stake is the composition of those large contests of policy traditionally fought out in non-judicial forums, by which governments and the actions of governments are made and unmade."[48] By acting in this area of law, the plurality violates its own place in American government as it violates the long-standing, "unwillingness to make courts arbiters of the broad issues of political organization historically committed to other institutions and for whose adjustment the judicial process is ill-adapted - has been decisive of the settled line of cases, reaching back more than a century."[49] If the Supreme Court is willing to violate the tradition of restraint in this area of settled law, the fear is that the Supreme Court will violate its restraint in other areas of

[48] *Baker* v. *Carr*, 369 U.S. 186, 287 (1962).

[49] *Baker* v. *Carr*, 369 U.S. 186, 290 (1962).

settled law, establishing the "private views" and "political wisdom" of the justices as the "the measure of the Constitution."[50]

By understanding its authority and place in society and ignoring partisan politics, the Supreme Court can remain the impartial arbitrator of the constitution. Justice Frankfurter writes that the judiciary ought to understand its own judicial impotence in realizing that, "there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power."[51] This judicial self-awareness extends the authority of the Supreme Court, which, "ultimately rests on sustained public confidence in its moral sanction," and develops from "complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements." [52] The authenticity of the American form of government rests with the ability of the branches of government to follow their own powers and not interfere upon the rights and duties of other branches of government. As Justice Harlan declares, *Baker* concerns, "the right of a State to fix the basis of representation in its own legislature,"[53] while Justice Frankfurter argues as a result of the plurality's decision in *Baker*, the Supreme Court "empowers the courts of the country to devise what should constitute the proper composition of the legislatures of the

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[50] *Baker* v. *Carr*, 369 U.S. 186, 301 (1962).

[51] *Baker* v. *Carr*, 369 U.S. 186, 271 (1962).

[52] *Baker* v. *Carr*, 369 U.S. 186, 267 (1962).

[53] *Baker* v. *Carr*, 369 U.S. 186, 331 (1962).

fifty States," and, if the state courts are unable to fulfill the duty, then the federal courts must.[54] In this conception of authority, Baker concerns not the relationship between the citizen and the state but the interplay between Republicans and Democrats for the control of the Tennessee state government. If and when the judiciary interferes, the consequence will be the reconfiguration of politics at the local level.

Respecting the Limitation of Power and the Authority of the Legislature

A further complaint by Justice Frankfurter suggests that the plurality's decision relies on an authority that it does not possess: determining the meaning of the Guaranty Clause by instituting theories of representation and of political philosophy. Similar to the Supreme Court's decision in *Luther* v. *Borden*, the Supreme Court does not possess the authority to hear cases on every clause of the constitution but only on certain clauses of the constitution on which it can provide relief. One clause that escapes judicial cognizance is the Guaranty Clause, especially as citizens as the Supreme Court to enforce notions of political equality within the Guaranty of a republican form of government. Justice Frankfurter writes that *Baker* is a "Guaranty Claim masquerading under a different label" and, as such, the Supreme Court can lay no claims to judicial competence in this area of law.[55] By raising concerns about the Guaranty Clause, Justice Frankfurter warns the plurality that they must think about structural composition in order to act and, to think of structural composition, especially in relation to incorporating democratic theory,

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[54] *Baker* v. *Carr*, 369 U.S. 186, 269 (1962).

[55] *Baker* v. *Carr*, 369 U.S. 186, 297 (1962).

is beyond the cognizance of the judiciary.[56] In this conception voting rights, but only certain aspects of voting rights, fall under the category of the Guaranty Clause of the constitution as those rights follow from legislative action and concern the composition and allocation of power in the state. The appellants' claim, that they suffer from discrimination through a debasement of voting power that presents a distortion of representative government, rests on the notion that they do not receive an appropriate share of political power in the state, which according to Justice Frankfurter, is the result of state discretion as no matter which redistricting plan the state creates, some voices will not possess the same electoral strength.[57] Yet these citizens without a voice cannot rely on the judiciary as the judiciary possesses no authority to remedy the situation since this occurs from the discretionary power of the legislature as "'Equal Protection' is no more secure a foundation for judicial judgment of the permissibility of varying forms of representative government than is "Republican Form."[58] In quote that dissenting justices invoke throughout reapportionment cases, Justice Frankfurter proclaims:

> What, then, is this question of legislative apportionment? Appellants invoke the right to vote and to have their votes counted. But they are permitted to vote and their votes are counted. They go to the polls, they cast their ballots, they send their

[56] Guy-Uriel E. Charles, "Constitutional Pluralism and Democratic Politics; Reflections on the Interpretive Approach of *Baker* v. *Carr*," North Carolina Law Review 80 (2002): 1114. Justice Frankfurter's position is contradictory at best as his argument against judicial involvement into the apportionment decisions also rests on a conception of democratic theory, especially the noting that it is anti-democratic for the judiciary to interfere democratic politics, (1155).

[57] *Baker* v. *Carr*, 369 U.S. 186, 297 (1962).

[58] *Baker* v. *Carr*, 369 U.S. 186, 300 - 301 (1962).

> representatives to the state councils. Their complaint is simply that the representatives are not sufficiently numerous or powerful - in short, that Tennessee has adopted a basis of representation with which they are dissatisfied. Talk of "debasement" or "dilution" is circular talk. One cannot speak of "debasement" or "dilution" of the value of a vote until there is first defined a standard of reference as to what a vote should be worth. What is actually asked of the Court in this case is to choose among competing bases of representation - ultimately, really, among competing theories of political philosophy - in order to establish an appropriate frame of government for the State of Tennessee and thereby for all the States of the Union.[59]

Justice Frankfurter stakes his authority on the grounds that the judiciary cannot determining the meaning of the right to vote necessary to sustain a Republican form of government and it certainly cannot invoke political equality as the standard since it is but one of many choices for the legislatures, and not the judiciary, to discern. He states to, "divorce 'equal protection' from 'Republican form,' is to talk about half a question."[60] Yet his narrow reading of the right to vote in *Baker*, which refers to the physical act of voting, conflicts with a more expansive reading in *Gomillion*, which refers to the meaning behind that act. His comment that, *Baker* "is not a case in which a State has, through a device however oblique and sophisticated, denied Negroes or Jews or redheaded persons a vote,

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[59] *Baker* v. *Carr*, 369 U.S. 186, 299 - 300 (1962).

[60] *Baker* v. *Carr*, 369 U.S. 186, 301 (1962).

or given them only a third or a sixth of a vote" rings hallow as the state legislature determined that a class of votes, mainly those residing in urban areas, possess a diminished ballot in comparison to the rural voters. As he deflects away from the meaning inherent in the Constitution, Justice Frankfurter defers to the authority of the state legislature since he believes that they possess the authority to determine the right to vote, even if the judiciary has in the past determined the meaning of a ballot. This leads only to a contradiction to his authority within his own jurisprudence as he determines the meaning of the right to vote in some cases but not all cases, diminishing his claim to a categorical exemption of judicial action in reapportionment and redistricting cases.

For the dissenters in *Baker*, the proper remedy must develop from an authoritative voice of the people who working through the state legislature or Congress and not the judiciary. "The Framers," Justice Frankfurter writes, "carefully and with deliberate forethought refused so to enthrone the judiciary. In this situation, as in others like its nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate."[61] The judicial belief in equal representation must not be greater than the state legislature's ability to develop policy.[62] For the dissenters, it is best for the people to persuade the legislative bodies to act while it is far from best to let the judiciary proclaim what the people, the states, and Congress ought to do with reapportionment. Yet, in Justice Frankfurter's view, the power does not necessarily rest within the hands of the people but with the discretion of state legislators and there is little discursive space for

[61] *Baker* v. *Carr*, 369 U.S. 186, 270 (1962).

[62] *Baker* v. *Carr,* 369 U.S. 186, 277 - 278 (1962).

the citizens to challenge the authority of the state legislators and receive recognition for their interests.

Justice Frankfurter basis his decision on the judiciary's involvement in reapportionment and redistricting on the belief that self-government is self-correcting. Yet, as 60 years passed in the state of Tennessee, there was no self-correction. While self-correction can occur to some degree, such as the limitation of the number of rural districts because of the fixed number of representatives in the legislature, state legislators can redistricting to maintain imbalance between rural and urban areas.[63]

One failed apportionment allowed the state legislature to acquire the power of the people and each failed apportionment further entrenched the legislature. By focusing this case on situated political knowledge and the rights of state legislatures, and the political parties that run them, to determine how to respond to that local knowledge, the dissenters deflect away from the rights of voters within the state. Justice Harlan declares that he finds nothing in the Equal Protection Clause "or elsewhere in the Federal Constitution which expressly or impliedly supports the view that the state legislatures must be so structured as to reflect with approximately equality the voice of every voter."[64] "In short," Justice Harlan writes, "there is nothing in the Federal Constitution to prevent a State, acting not irrationally, from choosing any electoral legislative structure it thinks best suited to the

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[63] Allan P., Sindler, "*Baker* v. *Carr*: How to 'Sear the Conscience' of Legislators," *The Yale Law Journal* 72 (1962): 25. Sindler notes that the presence of malapportionment hinders the viability of the states' right argument as it shows that legislators seem unresponsive to the people.

[64] *Baker* v. *Carr*, 369 U.S. 186, 332 (1962).

interests, temper, and customs of its people."[65] Rather than have the judiciary find a solution to all of the interests and competing preferences within a state, Justice Harlan would prefer to allow this choice to develop through the state legislatures and provide the elected officials, and not the people themselves, to determine the allocation of resources and the state and local customs without widespread debate among all citizens. Further, even if the judiciary were to enter the debate, the only way in which the Supreme Court could establish its authority is through a very narrow and legal sense, and, as a result, the judiciary would not be able to comprehend the complexity of reapportionment.

Yet, the arguments of Justice Harlan returns us to the nature of the complaint, which reinforces why representation in *Baker* is not self-correcting and the arguments of the dissenters loses its authority for controlling the apportionment and districting jurisprudence. Theoretically, the foundation of the country rests upon the political and ethical notion of self-government whereby if Congress fails the people, then the people could vote them out of office; the same would apply at the state level. Yet, in reality, the institutional practice of representation before *Baker* precluded resolution and the judicial invocation of the "political question" continued the status quo of representing interests and not people regardless of the interests and rhetorical strategies of the citizens of Tennessee. Justice Frankfurter's position provides authority to the states to enact reapportionment though that system lacks legitimacy since it prevents meaningful elections, denies citizens any legal recourse, and removes fairness and equality from the

[65] *Baker* v. *Carr*, 369 U.S. 186, 334 (1962).

political process as it politicizes the law to affirm the state over the citizen and rural citizens over urban citizens. State legislators distributed resources throughout the state with no regard to fairness of all of the state's citizens. This distribution, like apportionment itself, was not up for debate, which diminished the force of Frankfurter's belief that the people possessed the authority necessary to determine reapportionment.

Complicating this matter was the fact that the state legislatures ensured there was no means for citizens to enact any electoral change. While gubernatorial candidates could discuss reapportionment, they, like their constituencies, would not possess the power to enact legislation to alleviate the problem. Justice Frankfurter's use of democracy could not include the will of the majority, the voice of the people, or fairness in the electoral system as the minority governed the majority and used the resources of the majority. Representation under the view of Justices Frankfurter and Harlan fosters notions that civic participation rests upon the self-recognition of knowing one's place in society as the people who receive less representation ought to know that unless they offer society more they will not receive more representation. If legitimacy in a representative government requires the consent of the governed, which develops from all citizens in the state rather than just a few in a state, then the legislative entrenchment in the pre-*Baker* era could not be considered legitimate since the nature of authority constrained the political process.

Reapportionment and the Authority of "The People"

While the dissenters attempted to profess authority in terms of prior case law and the discretion of the legislative branches, the transition between *Gomillion* and *Baker* marks the *Thucydidean moment,* or, the time when the rhetorical tradition of apportionment lost its authoritativeness and the rhetoric needed to recreate the tradition. Because of the Supreme Court's decision in *Baker*, Justice Brennan recharacterized the idea of representation as a voting right rather than a political question. By engaging in this act of redefinition, the plurality's decision opens discursive space to allow citizens, by using the judiciary, to challenge apportionment and districting schemes, which transferred power back into the hands of the people and provided a sense of checks and balances to the separation of power. After *Baker*, a political question involved the relationship between the branches of the federal government and not the relationship between the federal government and the states. The decision of the plurality rests on two sources authority: the first source authority rests on the redefinition of the separation of powers in include the checks and balances necessary to preserve Constitutional rights and the second source of authority rests on the ability of the Justice Brennan to define apportionment as a voting right rather than a political question.

Justice Brennan and the Voice of Authority

As Perelman and Olbrechts—Tyteca note, "a definition is always a matter of choice," and the person creating or employing a new meaning will claim that this is the

only reasonable meaning or the "only meaning corresponding to current usage."[66] To combat the long-standing decisions of the Supreme Court and the most important rhetorical constraint within the jurisprudence of apportionment and districting, Justice William Brennan's opinion in *Baker* relies on a rhetorical strategy of redefinition, altering the concept of the "political questions" doctrine to remove the rhetorical constraint. Yet, the new authority of the Supreme Court to guide the reapportionment decisions does not concern the justices themselves but in the procedural rules guiding the justices. While the holding in *Luther* v. *Borden* rests on the concept of a political question first developed in *Marbury* v. *Madison*, the Taney Court failed to provide an explicit explanation or principled guideline for the invocation of the political question, relying only on a self-evident notion that there is a difference between the political and the legal. Even though the doctrine lacked a full, judicial understanding, the Supreme Court relied on it to avoid answering questions concerning malapportionment or the Guaranty Clause in the constitution. Yet, Justice Brennan believed that the persistence of malapportionment within the states prevented the United States from reaching the "high principles of democracy of democratic egalitarian government" associated with the Constitution.[67] By narrowing the definition of "political,"[68] Justice Brennan diminished the constraints upon

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[66] Chaim Perelman and Lucy Olbrechts–Tyteca, *The New Rhetoric: A Treatise on Argumentation*, (Notre Dame: The University of Notre Dame Press, 1969), 448.

[67] David E. Marion, *The Jurisprudence of Justice William J. Brennan Jr.: The Law and Politics of "Libertarian Dignity,"* (New York: Rowman and Littlefied Publishers, Inc., 1997), 27.

[68] David E. Marion, *The Jurisprudence of Justice William J. Brennan Jr.*, 27.

the authority of the Supreme Court to decide reapportionment cases, allows himself discursive space to recreate apportionment as cases that concern political rights and not political questions.

After reviewing the facts of the case in *Baker*, which sets the ground for judicial action because of legislative inaction, Justice Brennan redefines the procedural rules that the Supreme Court must follow, showing how other justices— Justice Frankfurter—, prior Supreme Courts— the Supreme Court in *Colegrove*—, and state legislatures— the Tennessee State Legislature— have engaged in misreadings of the Constitution requirements and judicial precedent. Necessary to the development of new standards is the ethos of the Court, especially as Justice Brennan navigates the checks and balances with the separation of powers. To correct the misreadings, Justice Brennan reviews the actions of the district court,[69] as well as the concepts of jurisdiction of the subject matter,[70] standing,[71] and

[69] *Baker* v. *Carr*, 369 U.S. 186, 196 (1962). According to Justice Brennan, the district court dismissed the claim because of want of jurisdiction and failure to state a justiciable cause of action. Further, he noted that while the District Court believed a constitutional violation occurred, the district court noted the "judicial impotence" to correct the violation (197).

[70] Jurisdiction, according to Justice Brennan, concerns whether or not the case arises under the Federal constitution, laws or treaties or under Article III, 2; or whether or not this is a case of controversy; or "the cause is not one described by any jurisdictional statute," (198). The cause of action in this case arises under the constitutional as the challenge concerns the textual referent of the fourteenth amendment and the court possesses authority under III, 2 to hear cases that concern the fourteenth amendment.

[71] Standing concerns the concerns whether or not the person involved possess a "personal stake," or suffers an injury, to receive a judicial remedy, whether or not he defendant caused or initiated the harm, and whether or not the courts can provide a remedy. In Baker, Brennan saw no conflicts with the first two as the voters in this case established the disadvantaged they faced at the polls though the judicial remedy would not be established until a later case (205 - 206). Further, if the Supreme Court possesses the authority to decide electoral cases when state agents or citizens harm other citizens by creating false tallies, refusing to count votes or arbitrarily counting votes, and by stuffing the ballot box or other actions that dilute the strength of the vote, they can show harm through malapportionment. (208).

justiciability.[72] By explicitly defining these judicial procedures for the first time, Justice Brennan reaccentuates the rhetorical tradition as well as invents the discursive space to hear apportionment cases though this new authority rests on the ability of the Supreme Court to manage a new ethos of judicial restraint.

For Justice Brennan, the new definition of a "political question" applies only to the relationship between the coordinate branches of government and the separation of their powers and not to the relationship between the federal government and a state government.[73] By narrowing the scope of "political" in just that one sentence, Justice Brennan provides more protection for citizens, expands the power of the federal government, especially the judiciary, and subordinates the states to the federal government, reducing their discretionary power when enacting legislation. Yet, by doing to increasing the scope of judicial authority, Justice Brennan's decision needs to find its own self-correction to decrease the ability of the Supreme Court to hear all cases brought forth and diminish the apparent ethos of judicial supremacy. Paying reverence to precedent, but only precedent that is applicable or correct, he notes that certain representative cases provide the "analytical threads" that constitute the political questions doctrine, which highlight the categories of federal power dealing with the co-equal

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[72] Justiciability concerns whether or not the case was properly brought before the court in relation to whether or not those involved possess standing, mootness, or ripeness. Justice Brennan reviews the "political questions" doctrine under justiciability (208 – 237).

[73] *Baker* v. *Carr*, 369 U.S. 186, 210 - 211 (1962); David E. Merton, *The Jurisprudence of Justice William J. Brennan Jr.*, 27. In Baker, he writes a political question concerns, "Whether a matter has in any measure been committed by the Constitution to another branch of government or whether the action of that branch exceeds whatever authority has been committed."

branches of government may, but not necessarily, exists beyond the scope of judicial review.[74] Finally, Justice Brennan lists the new rules of the "political questions" doctrine to restore an ethos of judicial restraint involving the separation of powers, which present the threshold to judicial power.[75]

If the judiciary is to follow these rules, it reveals that the judiciary follows the necessary authority to hear and decide a case or to defer the controversy to the proper branch of government. The self-imposed judicial requirements institute a legal reasonableness that follows the simple belief, and the simplicity is deceiving, that if a person presents a perceived constitutional harm and the power to fix that harm does not rest with another party or the Supreme Court believes it is not interfering or would be imprudent to act and the judiciary can develop a solution to the problem, then the Court can procedure to hear arguments in the challenge. In the review of precedents, Justice Brennan admits humility that the Supreme Court can be wrong as it has been incorrect in this area of law though if the law is incorrect it is incorrect because the justices believe that

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[74] *Baker* v. *Carr*, 369 U.S. 186, 211 – 217, (1962). According to the Justice Brennan, the representative cases which help guide the political questions doctrine concern foreign relations, dates or duration of hostilities, validity of enactments (especially for constitutional amendments), and the status of Indian Tribes. When examining foreign affairs, Justice Brennan argues that the President determines which "nation has sovereignty over disputed territory" but once sovereignty is politically determined, courts may "examine the resulting status and decide independently whether a statute applies to that area, (212).

[75] *Baker* v. *Carr*, 369 U.S. 186, 217 (1962). [1] A textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. In *Vieth* v. *Jubelirer*, Justice Scalia argues that these tests occur in descending order of both importance and certainty. See *Vieth* v. *Jubelirer*, 541 U.S. 267, 278 (2004).

the precedent is bad or no longer possesses authority in society, challenging the foundation of the law itself. Also, there is also an admission by Justice Brennan that the decisions of the Court will have unavoidable political implications but that is not a reason to avoid the case. The Court's "political questions" doctrine does not exclude the judiciary from hearing "political cases" and it is the responsibility of the judiciary employ a skepticism to controversies at hand and to the actions of the government by showing "the necessity for discriminating inquiry into the precise facts and posture of the particular cases."[76] Restoring the doctrine in *Marbury*, the Court states, "the courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority."[77] A "political question" can be nothing more than a "play on words"[78] and unless the judiciary undertakes its action with a judicial skepticism, the governmental bodies may violate the constitutional rights of citizen. Of course, what is necessary is some textual referent, which Justice Brennan finds in the Equal Protection Clause of the Fourteenth Amendment.

Political Questions, Political Rights, and Political Rationality

After redefining the procedural authority of the Supreme Court, Justice Brennan turns his attention to *Baker*. According to the tests of the political questions doctrine, the controversy in *Baker* exists outside of the nonjusticiable realm of court action as the case

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[76] *Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

[77] *Baker* v. *Carr*, 369 U.S. 186, 218 (1962).

[78] *Baker* v. *Carr*, 369 U.S. 186, 209 (1962).

does not concern a coequal branch of government or an action abroad or a grave disturbance at home. Instead, Baker concerns the interpretation of the Equal Protection Clause, which provides judiciable standards that are well "developed and familiar."[79] The criticism of *Baker* is two fold. First, though Justice Brennan's opinion locates apportionment on a clause of the Constitution that the Supreme Court can interpret, it does not provide a judicially manageable standard and fails to answer Justice Frankfurter's "remonstration that the Constitution did not provide any guidance to the federal courts to justify judicial supervision of the political process."[80] Second, as stated early, Justice Frankfurter argues that reliance on the Equal Protection Clause serves just as a mask for interpretation of the Guaranty Clause. Yet, for Justice Brennan, the Equal Protection Clause provides an escape from the authority of the Guaranty Clause, an escape that was not present in *Luther*. While this case, "in one sense" involves the "allocation of political power within a State, and the appellants might conceivably have added a claim under the Guaranty Clause," Justice Brennan argues that it is unnecessary to interpret the equal protection clause in relation to the Guaranty Clause since the case law prohibiting judicial involvement is clear and "any reliance on that clause would be futile;" however, reliance on the Equal Protection Clause is preferable since the clause is "not so enmeshed with

[79] *Baker* v. *Carr*, 369 U.S. 186, 226 (1962).

[80] Guy-Uriel E. Charles, "Constitutional Pluralism and Democratic Politics," 1105. Guy-Uriel notes that Justice Frankfurters comments were incorrect as standards did to judge reapportionment were available and that the idea of political equality did not exist ex nihilo (1124).

those political questions elements,"[81] meaning that it prohibits state but not federal action.

In his division of the Guaranty Clause and the Equal Protection Clause, Justice Brennan recreates the focus of apportionment cases from political questions to voting rights, beginning a new rhetorical tradition for the judiciary to discern apportionment and districting decisions. Throughout *Baker*, the authority of Justice William Brennan occurs through the interaction between the community and the Supreme Court, especially in the reconsideration of the past and a "creative reflection" of the political and legal wisdom in relation to the community's experience.[82] In the reconsideration of the tradition, Justice Brennan attempts judicial reconciliation between the establishment of the political questions doctrine from *Marbury* v. *Madison* and the political questions doctrine in pre-*Baker* lines of cases. Citing the development of the "political questions" doctrine in *Luther* v. *Borden*, Justice Brennan argues that while the apportionment controversy concerns the power of other branches of government and while the judicial tradition that "the Guaranty clause is not a repository of judicially manageable standards," the judicial facts does not warrant a categorical judicial ban on judicial considerations of representation.[83] While the Guaranty Clause works for the decision in *Luther*, it is no longer the only

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[81] *Baker* v. *Carr*, 369 U.S. 186, 226 - 227 (1962).

[82] John M. Murphy, "Inventing Authority: Bill Clinton, Martin Luther King Jr., and the Orchestration of Rhetorical Traditions," *Quarterly Journal of Speech* 83 (1997): 76.

[83] *Baker* v. *Carr*, 369 U.S. 186, 223 (1962). *Luther* rested on consideration of the Guaranty Clause only as it occurred before the ratification of the Civil War Amendments.

authoritative clause available for judicial interpretation as the Equal Protection Clause transforms the relationship between the citizen and the state. Additionally, the Supreme Court's precedent shows that the equal protection clause does not rest on a conditional interpretation with the Guaranty Clause. In *Pacific States Tel. Co* v. *Oregon*, 223 U.S. 118 (1912), [84] a case concerning interpretation of the Guaranty Clause, the Supreme Court upheld that the power of interpreting that clause rests with Congress. Yet, this case represents the initial use and rejection of the due process and equal protection claims in conjunction with the Guaranty Clause. For Justice Brennan, the decision reveals that the Court's ruling shows that that the fourteenth amendment clauses are unnecessary and, consequently, separate from the Guaranty Clause. Consequently, because the of the constitutional provisions within the fourteenth amendment, Justice Brennan determines that the meaning of *Luther* is no longer authoritative, diminishing its authority as the defining political questions case.

After reconciling the "political questions" cases, Justice Brennan attempts to reconcile the fragmented precedent found within in the pre-Reapportionment Revolution, especially with the discrepancies existing between *Smiley* v. *Holm, Colegrove* v. *Green, and Gomillion* v. *Lightfoot.* Justice Brennan argues that in *Goillion* the Supreme Court struck down a districting plan because the Alabama state legislature diminished the meaning of

[84] The case concerns whether it is the "duty of the Court or he province of Congress to "determine when a state has ceased to be republican in form, and to enforce the guaranty of the Constitution on that subject (113). Justice Brennan also cites *Mountain Timber Co.* v. *Washington*, 243 U.S. 219 (1917) and *O'Neil* v. *Leamer*, 239 U.S. 244 (1915) where the Supreme Court treated the equal protection and due process clause in depth and separately from the Guaranty Clause.

the right to vote and hence the Voting Rights of the black citizens in Tuskegee by removing them from city limits and, even though the action of the Alabama State Legislature derived from their authority via the political arena their action violated constitutional rights. In *Colegrove*, the concurring opinion by Justice Rutledge, and not the decision by Justice Frankfurter, is the controlling decision and it concerns want of equity and not lack of jurisdiction. As Justice Brennan notes, in *Colegrove*, Justice Rutledge believes that because of the Supreme Court's decision in *Smiley*, the Court possesses the authority to hear cases involving apportionment, and the reason for in action in *Colegrove* concerns the lack of time between the decision and the election that would afford relief. While the authority of the Constitution within the commands of Article I, 4, Article I, 5, Article I, 2 concern congressional elections and not apportionment, the Supreme Court has provided its own authority to hear apportionment cases, even if the prior justices ignored that authority. In order to fulfill its role as the "final arbitrator of the Constitution" and since apportionment is a political right and not a political question, the Supreme Court must fulfill its obligation to the people by remanding the decision to the district court for further proceedings, especially since there is enough time between the Supreme Court's decision, the eventual decision of the lower court, and the next set of lections. If the state of Tennessee is to provide districting for its citizens, then the state must treat the citizens equally.

For Justice Brennan, the decision in *Baker* concerns the ability of the individual to reclaim power usurped by the states. By recharacterizing the political questions doctrine

and the basis that apportionment is a constitutionally protected political right like other voting rights rather than a political question, Justice Brennan recreates the role of the citizen to find redress from state governments. He writes that the citizens in Baker are entitled to a hearing since, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives in injury."[85] Further, for the judiciary to deny the rights of citizens, it would be rejecting its moral obligation to the citizens of the United States. According to Justice Brennan, if a citizen brings forth a claim under the Constitution then it becomes the responsibility of the citizen to demonstrate harm and the responsibility of the judiciary to determine if there is a substantial constitutional claim. Refusal to enter the "political thicket" to determine the deprivation of "voting rights" would lead to an abdication of responsibility on behalf of the judiciary.

Competing Sources of Authority

In *Baker*, three Justices supply concurring opinions that compete with the holding of the case and the vision of democracy by Justice Brennan's. Justice Potter Stewart, the fifth and controlling vote in the case, reads *Baker* narrowly, stating the decision means that the court possesses jurisdiction of the subject matter, it is a jusitciable cause of action appropriate to relief, an that the appellants possess standing to bring forth a claim.[86] In his concurrence, Justice Stewart attempts to narrow the reading of *Baker* to reconcile the

[85] *Baker* v. *Carr*, 369 U.S. 186, 209 (1962).

[86] *Baker* v. *Carr*, 369 U.S. 186, 265 (1962).

plurality with the dissenters and *Baker* with precedents. As for the competing visions of the Justices, Stewart argues that *Baker* does not call for equality and does not preclude the state from promoting interests. Instead, a state must act rationally to and not discriminate against citizens through an arbitrary reapportionment plan. States still possess the ability a "wide scope of discretion in effecting laws which affect some groups of citizens differently than others," though citizens possess the ability to counter that treatment, allowing for reasonable counter-balancing between urban and rural citizens though and the potential for judicial remedies.[87] According to this decision, representation works best when there is a balance between the state government and the citizens, with the burden of proof upon the citizens to prove that a districting plan causes harm.

In the second concurrence, Justice Thomas C. Clarke argues that reapportionment needs to be governed by rationality and the plan in *Baker* defies rationality. Not happy with the "mental blindness" from the opinion plurality by Justice Brennan or the dissenters by Justices Frankfurter and Harlan, Justice Clark seeks a middle-ground approach that would provide guidance to the judiciary in reapportionment but not provide the Supreme Court excessive to interfere with the political process, limiting its involvement to egregious cases. Further, it would allow for the state to protect interests but prevent them from pursuing plans that are irrational.

In his concurrence, Justice Clark explains rationality in terms of following constitutional standards or with treating similar counties alike. Rather than following the

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[87] *Baker* v. *Carr*, 369 U.S. 186, 265 - 266 (1962).

precedent of the Supreme Court in terms of its reapportionment decisions, Justice Clark focuses on decisions only in so far as they rest judgment on the Supreme Court striking down or upholding cases where there is a rational policy behind legislative action.[88] He notes that the constitution of Tennessee calls for the statewide numerical equality of representation with certain qualifications and this constitutional provision is rational. Yet, the actions of the state legislature have been irrational as it ignores the constitutional provisions and allocates representatives by counties and districts that the legislators create according to their own discretion, leading to the wide discrepancy in voting strength between urban and rural, existing only as a "crazy quilt."[89] Disagreeing with Justice Frankfurter, Justice Clark notes that since there is no initiative and referendum available to the citizens, "The majority of the voters have been caught up in a legislative strait jacket. Tennessee has an 'informed, civically militant electorate' and 'an aroused popular conscience,' but it does not sear 'the conscience of the people's representatives.'"[90] So long as the state legislators represent only their constituencies, continue to protect incumbents, prevent reapportionment, and refuse constitutional conventions, there will be no legislative recourse. [91] Further, while, "It is said that there is recourse in Congress and

[88] *Baker* v. *Carr*, 369 U.S. 186, 253 (1962).

[89] *Baker* v. *Carr*, 369 U.S. 186, 256 (1962).

[90] *Baker* v. *Carr*, 369 U.S. 186, 259 (1962).

[91] *Baker* v. *Carr*, 369 U.S. 186, 260 (1962).

perhaps that may be," Congress has never attempted reform in any state, making this recourse, from a practical standpoint, without substance.[92]

In attempting to find middle ground, Justice Clark seeks to rest his opinion of the ability of the judiciary to determine the rationality or irrationality of a reapportionment plan on a case-by-case basis, which would further involve the judiciary into the political thicket more so than Justice Brennan's implicit call for political equality. For Justice Clark, the function of the Supreme Court is to protect national rights and for far too long the Supreme Court neglected the national rights of citizens in the area of law; and, by deciding these cases, the Supreme Court only enhances its authority as it strengthens those rights.[93] In order to render a proper decision, the Supreme Court must focus upon the rationality in the plan. As rationality depends on a particular audience or a particular judiciary, the ability of state legislatures to ignore their own constitutional commands such as the state legislature of Tennessee, ignoring the constitutional provisions for representation based on numerical equality, rests with a judicial determination. The rationality principle leaves the state of American democracy in flux. If a democratic system implies that the preferences of the people should prevail,[94] then the decision of Justice Clark only partially opens access to representation for the people. By structuring electoral system to protect interests before elections, Justice Clark aggress with the dissenters that

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[92] *Baker* v. *Carr*, 369 U.S. 186, 260 (1962).

[93] *Baker* v. *Carr*, 369 U.S. 186, 262 (1962).

[94] G. Bingham Powell, Jr., *Elections as Instruments of Democracy: Majoritarian and Proportional Visions*, (New Haven: Yale University Press, 2000) 159 – 160.

public opinion should matter only to a degree that the state legislators allow the people to matter unless the state legislatures prevent the people from challenging the system.

For Justice Douglas, the author of the third opinion for the Supreme Court's intervention, the authority necessary to decide a case develops in the case at hand rather than through precedent Baker is "Governed by Gomillion!"[95] Even though Chief Justice Warren feared that his views would prevent a majority, Justice Douglas would play an instrumental role in reading political equality as a predominant value of the Constitution though the "One Person, One Vote" from rule his majority opinion in *Gray* v. *Sanders*, 372 U.S. 368 (1963), which answered one of Justice Frankfurter's major obstacles about the Supreme Court's involvement in reapportionment.[96]

In *Baker*, Justice Douglas desired to set aside the political questions doctrine to consider the issue at hand: the "recurring problem of the of the relation of the federal courts to state agencies. More particularly, the question is the extent to which a State may weigh one person's vote more heavily than it does another's."[97] While the constitution set numerous provisions about the voting rights, the Constitution itself presents large gaps. Yet, with those large gaps, "those who vote for members of Congress do not 'owe their right to the State law in any sense which makes the exercise of the right to depend

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[95] Jim Newton, *Justice For All*, 390.

[96] Melvin I. Urofsky, "William O. Douglas as Common-Law Judge," *The Warren Court in Historical and Political Perspectives*, ed. Mark Tushnet, (Charlottesville: University Press of Virginia, 1993) 81. Justice Douglas, who described himself as a strict constructionist in terms of constitutional interpretation, said of himself that he would rather create than follow precedent as the creation means the "adjustment of the Constitution" to the present even if that means not applying doctrine seriously, (81- 82).

[97] *Baker* v. *Carr*, 369 U.S. 186, 242 (1962).

exclusively on the law of the State.'"[98] States possess numerous barriers on employing its discretionary power in the area of voting rights if that discretionary power is tantamount to discrimination and the question for Justice Douglas concerns whether or not a state discriminates against certain groups of citizens if one for a citizen in one county is worth eight votes for a citizen in another county or 19 votes for a citizen is a third county. Even though this area of law is complex, as many areas of law are complex, since the Supreme Court and the federal courts possesses the authority to discern cases involving voting rights and the federal government intrudes into the election machinery of the states for numerous reasons, the Supreme Court's area of into this law is nothing new and would reconcile the decisions such as *Colegrove* that serve as exceptions and not the rule.[99]

Political Institutions: Democratic Structures, Judicial Review, and the Establishment of a Judicial Restraint

Law and Democracy: Foundations and Structures

In *The Common Law,* Oliver Wendell Holmes, Jr., offers his reconceptualization of the meaning of the law, declaring that, "The life of the law has not been logic; it has been experience."[100] Breaking from the tradition of Legal Formalism, a view that believes in the technicality of the law and that a judge discerns the correct decision through the correct

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[98] *Baker* v. *Carr*, 369 U.S. 186, 244 (1962).

[99] *Baker* v. *Carr*, 369 U.S. 186, 244 - 250 (1962).

[100] Oliver Wendell Holmes Jr., *The Common Law*, (New York: Dover Publications, 1991), 1.

application of the rules,[101] Holmes argues that "felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed."[102] If Holmes' view of the law is correct, then the law that enables democratic structures must reflect the experiences of the law and the experiences of the people.

In the pre-*Baker* apportionment decisions, the vision of the law and the vision of democracy contradicted the experience. In *Colegrove*, Justice Frankfurter's commitment to Legal Formalism concluded that the law and precedent requires the "vigilant of the people" to secure their political rights through the proper channels of law.[103] In *Baker*, Justice Frankfurter argues that a democracy rests on that "relief must come through an aroused popular conscience that sears the conscience of the people's representatives."[104] Yet, as Justice Douglas implies, the legal formalism that provides the foundation for reapportionment decisions highlights the futility of persuasion and the inability of the people to secure their political rights when divisions of power between classes of people and their representatives prevents the acceptance of arguments calling for a political revolution. Disagreeing with Justice Frankfurter, Justice Clark notes that since there is no

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[101] Melvin I. Urofsky, "William O. Douglas as common-Law Judge," 72.

[102] Oliver Wendell Holmes Jr., *The Common Law*, 1.

[103] *Colegrove v. Green*, 328 U.S. 54, 556 (1946).

[104] *Baker* v. *Carr*, 369 U.S. 186 271 (1962).

initiative and referendum available to the citizens, "The majority of the voters have been caught up in a legislative strait jacket. Tennessee has an 'informed, civically militant electorate' and 'an aroused popular conscience,' but it does not sear 'the conscience of the people's representatives.'"[105] So long as the state legislators represent only their constituencies, continue to protect incumbents, prevent reapportionment, and refuse constitutional conventions, there will be no legislative recourse. [106] Justice Clarks notes also that while, "It is said that there is recourse in Congress and perhaps that may be," Congress has never attempted reform in any state, making this recourse, from a practical standpoint, without substance. [107]

In Justice Douglas' concurrence, the laws that create democratic structures must rely on the experience of the people and not the formalism of the law. Justice Douglas' concern in apportionment lies not with the intricacy of the law but the correction of a perceived wrong to return the law to its correct path. The reapportionment precedents as well as the actions of the state legislatures, violates Justice Douglas' view that the law adapts to new conditions. Always willing to reconsider the precedent of the judiciary since the justices of the past may not understand the present conditions, Justice Douglas's decision to circumvent *Colegrove* reflects his belief that reconsidering precedent is a

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[105] *Baker* v. *Carr*, 369 U.S. 186, 259 (1962).

[106] *Baker* v. *Carr*, 369 U.S. 186, 260 (1962).

[107] *Baker* v. *Carr*, 369 U.S. 186, 260 (1962).

"healthy practice."[108]Like Justice Brennan, the moral obligation of the Supreme Court to set the law correct overrides the rules of judicial restraint and traditional detachment that Justices ought to employ. In the reapportionment cases, the discrimination at the hands of the state legislatures through the maintenance of malappporrtionment constrains the individual from participating in government and preserves representation in the past. Since this vision of representation ignores the voices of the people in the present, Justice Douglas believes that the law ought to mirror reality and, consequently a democratic form of government needs representation from the proper democratic structures, making Baker the correct decision to fix crisis in reapportionment.

In the plurality's decision, Justice Brennan attempts to reconcile the role of the judiciary with the new vision of the law and democracy. When discussing the authority and responsibility of the Supreme Court in determining political questions, Justice Brennan characterizes the Court justices who possess a moral obligation to the Constitution. If a political question concerns the separation of powers this diminishing the state governments' immunity to national judicial scrutiny, and provides an order for the federal courts to "act when every possible to protect rights and grievances."[109] With this redefinition, Justice Brennan presents the American people with a proposition: because of the continued neglect by the state legislatures, we will expand the rights of the people and diminish the scope of a political question to cover only the action between the

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[108] Melvin I. Urofsky, "William O. Douglas as Common-Law Judge," 83.

[109] David E. Marion, *The Jurisprudence of Justice William J. Brennan Jr.*, 28.

coordinate branches of government as to whether or not the Constitution commits an action to another branch of government or whether the action of that branch exceeds its authority.[110] Yet, the catch for the American people is that only one branch of government sits in the position to exert the "delicate exercise in constitutional interpretation," and, for the Supreme Court to engage at this level of interpretation, the Supreme Court, as well as the other branches of government and the American people, must accept the "responsibility of this Court as the ultimate interpreter."[111]

Justice William Brennan's opinion in *Baker* offers a corrective reading of the American political process while diminishing the ability of other governmental bodies to inflict harm on the process. In *Baker*, Justice Brennan offers the American people the same proposition that James Boyd White states Chief Justice John Marshall offers the American people in *Marbury* v. *Madison*: "the development, over time, of a self-reflective, self-corrective body of discourse that will bind its audience together by engaging them in a common language and a common set of practices."[112] Yet, this time, Brennan's opinion appropriates much more than the other branches of government would be willing to provide. Because of continued neglect, state legislators contributed to the decline of their ethos and their ability to make credible claims on representing all of the people, allowing for others to bypass the state legislatures as the sole authority for apportionment and

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[110] *Baker* v. *Carr*, 369 U.S. 186, 211 (1962).

[111] *Baker* v. *Carr*, 369 U.S. 186, 211 (1962).

[112] James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstructions of Language, Character, and Community* (Chicago: University of Chicago Press, 1982), 251.

districting.[113] Because of this loss in standing and the increase in the imbalance between the state and the citizens, Justice Brennan's opinion argues that this area of law requires a new foundation, enabling the judiciary to read into the apportionment law the values that are "consistent with the principles of egalitarian dignity" found within the Constitution. [114] By providing a new foundation for the law, Justice Brennan's decision in *Baker* would provide a better correlation between the law and experiences, as well as open up the judicial forum to a new group of individuals who were unable to seek electoral relief.[115] As the arbitrator of the constitution, the Supreme Court justice serves as, as Owen Fiss describes, the "paramount instrument of public reason."[116]

Yet, in the process of opening up the federal courts to the judicial and expanding the power of the judiciary to hear cases, the Supreme Court creates a problem of ethos. If the law concerns what the Justices say the law is, then the Justice need to provide constraints on there own power, especially since the Constitution is explicit in its command that the state legislatures possess the burden of representation. Consequently, the Supreme Court must experience a balancing act to allow for citizens to bring forth claims challenging apportionment and districting bills but ensure that the state governments retain the power to govern representation.

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[113] Allan P. Sindler, "Baker v. Carr: How to 'Sear the Conscience' of Legislators," 26.

[114] David E. Marion, *The Jurisprudence of Justice William J. Brennan Jr.,* 28.

[115] David E. Marion, *The Jurisprudence of Justice William J. Brennan Jr.,* 28.

[116] Owen Fiss, *The Law As It Could Be*, (New York: Ney York University Press, 2003), x.

The "New" Judicial Restraint of the Supreme Court

In *Baker*, Justice Brennan reconceptualizes the foundation on which apportionment decisions rests to reinvent the authority of the Supreme Court to decide reapportionment decisions and to provide citizens an ability to challenge the perceived discrimination by the state legislatures. In other words, the purpose of the reapportionment decisions, according to John Hart Ely, is to allow for the free and popular choice of representatives by the people and not by the states.[117] Yet, since the Supreme Court alters the foundation for the law, from a view of legal formalism that suggests the correctness of a decision depends on the application of rules and precedent to the view of legal realism, which suggests that the law concerns experience and not the syllogism, the Supreme Court needs to invent limitations to its authority that prevent the court from dominating the political arena as it invents its authority to hear case. The authority of justice, Owen Fiss argues, does not develop from any "unique moral expertise" but from the "limits of office through which they exercise power."[118]

The immediate failure of *Baker* as a communicative act concerns the way in which Justice Brennan's decisions ignores his own rules for the political questions doctrine. While stating that the judiciary possesses the ability to hear a case if it can develop a judicially manageable standard, then a decision that claims an area of law is not a political

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[117] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, (Cambridge: Harvard University Press, 1980), 125.

[118] Owen Fiss, *The Law As It Could Be*, x. Fiss argues that Justices can play this role as they are insulated from politics, though he derides the Supreme Court's decision in *Bush* v. *Gore* as being the culmination of years spent turning away from the views of the Warren Court, who instituted democratic values into the Constitution (x – xi).

question ought to contain a judicially manageable standard. While the opinions by Justices Brennan and Douglas imply the incorporation of political equality as a standard and Justice Clark's decision calls for a rationality test, the decision lacks a particular standard when the lower court rehears arguments in the case. After the Supreme Court's decision in *Baker*, the district court waited to provide a ruling on the apportionment in question as the Tennessee state legislature attempted reapportionment. After reapportioning the state, the district court heard arguments on the constitutionality of that plan, and that that while Baker provided "certain guidelines" and not "exact standards," the district court concluded that Tennessee House districts were "rational" as they balanced areas with population but the Senate plans were "irrational" plan and would not be rational unless it created representation of the basis of population since the House created representation on factors other than population.[119] In *Gray* v. *Sanders*, *Wesberry* v. *Sanders*, and *Reynolds* v. *Sims*, the Supreme Court declared that population and not rationality would be the basis for representation.

Knowing that the Supreme Court needed to reaffirm an ethos of restraint, the Supreme Court relied on cases after *Baker* to reinforce its image. In the process, the Supreme Court created a new rhetorical tradition on the basis of legal topoi reflecting this judicial restraint. If the Supreme Court is to follow its constitutional responsibility, it must protect the rights of citizens from state despotism and protect the right of an individual to case a meaningful vote. Yet, on the other hand, the Supreme Court must

[119] Phil C. Neal, "Baker v. Carr: Politics in Search of Law," 302 – 303.

reaffirm the power of the state to control reapportionment. The ethos of the Supreme Court materializes in the way in which the Supreme Court balances the protection of an individual's right and the power of the State to conduct reapportionment.

One of the most important reoccurring topoi in reapportionment cases is *legislative primacy* in redistricting, qualified with as long as the legislature meets the Court's constitutional requirements. The Court's argument for the legislative supremacy proceeds in the following way. First, the Supreme Court reminds its readers that the Supremacy Clause controls the actions between the States and the Federal Government, especially the Courts, and that apportionment in that States, based on either their Constitution or statute or from legislative action or inaction, needs to comply with the Equal Protection Clause.[120] Second, even though a plan may be unconstitutional and immediate relief should be granted, there will be circumstances, such as where an impending election is imminent, where effective relief in reapportionment cases by the Courts should be withheld in order for the political process to work. Third, the Supreme Court reminds its audience that "legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.[121] If the Supreme Court is to

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[120] *Reynolds* v. *Sims*, 377 U.S. 533 (1964). Author's note: the Supreme Court made similar arguments in the subsequent Reynolds cases where it praised the actions of the District Court, assigned responsibility for reapportionment to the Legislature, but reminded the Legislature it cannot violate Constitutional rights. The passage on "primary responsibility" appears in most reapportionment cases.

[121] *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

enter the "political thicket," it must do so only when citizens can establish that the state fails to protect their right to cast a meaningful ballot. Furthermore, once the judiciary acts, it is to defer to the legislature as much as possible, allowing the political branches to assume primary responsibility for the reapportionment and elections. Finally, if there is Court involvement, it must allow the proper time for the political process to work. It cannot interfere with elections by ruling too soon before an election. There must me enough time for the reapportionment to occur and to allow candidates times to adjust to the reapportionment.

The Supreme Court also engages in a balancing process as it determines how the states are to initiate reapportionment but remind the states that they have a duty to protect the constitutional rights of the citizens of the states. In *Wright* v. *Rockefeller*, 376 U.S. 52 (1964), the Supreme Court rules that citizens possess the burden of proof to establish a reapportionment plan is unconstitutional. [122] Unless shown otherwise, state actions carries the presumption that it is constitutional and the judiciary will only act if citizens can establish otherwise. Yet, while the citizens must bring forth a challenge, the state must offer a rational reason for deviation or correct a challenge as soon as possible. While Court allowed the states a reasonable amount of time to develop a plan, the

[122] *Wright* v. *Rockefeller*, 376 U.S. 52, 56 – 57, (1964). In *Wright*, appellants argued that Chapter 980 established "irrational, discriminatory, and unequal Congressional districts" as it segregated voters by "race and place of origin." The plan created one district—district 17—, which featured a predominance of white voters and excluded Puerto Rican and black voters, regulating them to the 18th, 19th, and 20th districts. The appellants claimed that this caused under representation of Puerto Ricans in the 17th district. The District Court found that the appellants did not prove that the boundaries of Chapter 980 depended on racial lines or that the legislators created the districts on considerations of "race, creed, or country of origin." *Wright* v. *Rockefeller*, 376 U.S. 52, 54 - 55, (1964).

reasonable time did not mean waiting for the next census. In *Swan* v. *Adams*, 383 U.S. 210 (1966) the Supreme Court requires that a state possesses no warrant for delaying action until the next census as that would result in a delay in effective representation.[123] If a citizens challenge a plan, then the State must provide a rational basis for deviations in population disparity. [124] If it does not provide a rational explanation, the state must reapportion.

In addition to the presumption of apportionment and districting plans, the Supreme Court relies on other decisions to reduce its action on reapportionment, especially in relation to the design of the district. In *Fortson* v. *Dorsey*, 379 U.S. 433, (1965), the Supreme Court requires that the Equal Protection clause does not necessarily require the creation of only single member districts, allowing for single member, multi-member, or floterial districts to protect political subdivisions. The Supreme Court would later clarify this in *Connor* v. *Johnson*, 402 U.S. 690, (1971), noting that if the judiciary were to order a reapportionment plan, then single member districts would be preferable to multi-member districts.[125] In *Scott* v. *Germano*, 381 U.S. 407 (1965), the Supreme Court rules that appropriate state action to correct malapportionemnt needs to be encouraged,

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[123] *Swann* v. *Adams*, 383 U.S. 210, 211 (1966).

[124] *Swann* v. *Adams*, 385 U.S. 440, 444 (1967). This decision occurred after the "One Person, One Vote," rule but before the establishment of de minimis standards.

[125] *Fortson* v. *Dorsey*, 379 U.S. 433, 436 (1965); *Connor* v. *Johnson*, 402 U.S. 690, 692 (1971).

meaning the district courts should step in only when the states fail to reapportion in a reasonable time.[126]

In each of the decisions, the Supreme Court attempts to find a balance between state discretion and the protection of constitutional rights for citizens. In the process of establishing this balance, the Supreme Court reaffirms its ethos to hear apportionment and districting cases but reaffirms the power of the states to control the process. By doing so, citizens still posses the ability to fight for effective representation but the Supreme Court refrains from appropriating the process of representation.

Conclusion: The Acceptance of Political Rights within the American Republic

As mentioned earlier, Justice Felix Frankfurter wrote that the legitimacy of the Court relied upon the "public confidence of its moral sanction." For this reason, Justice Frankfurter believed it was best if the judiciary remained on the sidelines as the political parties played political football over reapportionment. Unfortunately, for Justice Frankfurter, he was unable to persuade the Warren Court about his position. For Justice Frankfurter, his decision in *Baker* would be his Swan Song for legal formalism on the Court as in the weeks after *Baker*, Justice Frankfurter suffered a stroke and resigned soon there after. Justice Harlan, who provided the strongest dissent after Justice Frankfurter resigned from the Supreme Court, acquiesced eventually. Even though Justice Harlan believed that *Baker*, *Reynolds*, and the other decisions were wrong constitutionally, Justice

[126] *Scott* v. *Germano*, 381 U.S. 407, 410 (1965).

Harlan cited "judicial responsibility" and the idea "so long as those cases remain the law, I must bow to them" in support of the actions of the Warren Court.[127]

As Justice Frankfurter and Justice Harlan offered the minority position on the Court, they offered the minority decision in the political realm as well. Justice Frankfurter's beliefs about the judiciary remaining outside of the political thicket occurred at a time when the public's views of reapportionment shifted. According to Howard Ball in *The Warren Court's Conception of Democracy*, Baker arrived at a time when it was "'political feasible'" for the Supreme Court, given a Court majority favoring change, and a national majority likely to favor the change (and therefore aid in the implementation aspect of any future decision)"[128] to pronounce an alteration in case law. Further, as John Hart Ely notes, even some of the critics of *Baker*, such as Louis Jaffe, noted that the decision "enhanced the prestige of the Court."

While certainly not everyone altered their opinion of *Baker* and "Impeach Warren" signs existed throughout the South, some Americans believed that Baker was the correct decision and others started to rethink the meaning of representation within the United States. President Kennedy offered his complete support of the Supreme Court's decision and Attorney General Robert Kennedy believed that it was a "landmark decision;" further, Senators Kenneth Keating (D-NY) Barry Goldwater (R-AZ) believed

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[127] *Burns* v. *Richardson*, 384 U.S. 73, 99 (1966).

[128] Howard Ball, *The Warren Court's Conception of Democracy*, 90. Note: Tennessee was one of five states where there were legal challenges to state reapportionments. The others were Michigan, New Jersey, Maryland, and New York.

that it was the correct decision.[129] According to Richard C. Cortner, out of the 63 leading metropolitan newspapers, 39 favored the Court's opinion, ten opposed it, and the remained expressed "neutral or confused opinion."[130] In 44 states, less than 40% of the state's population could elect a majority of the elected representatives.[131] Five months after the Supreme Court's decision in *Baker*, 22 states fought battles in their state legislatures over reapportionment.[132]

As *The New York Times* noted, the Supreme Court's decision in *Baker* was both "inevitable" and "inconceivable." A change in the Supreme Court's jurisprudence occurred because the Justices in *Baker* possessed views on human liberty and American democracy that differed from the Justices who decided *Colegrove*.[133] *Baker*, according to an editorial in *The Washington Post*, represented a "momentous decision," and initiated the "first mile of what must inevitably be a long journey," to secure "representation of people (rather than cows or acres)."[134] Royee Hanson, the president of the Maryland Committee for Fair Representation, declared, "This may be a Magna Carta for urban people."[135] The

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[129] Richard C. Cortner, *The Apportionment Cases*, (Knoxville: The University of Tennessee Press, 1970), 144 – 146.

[130] Richard C. Cortner, *The Apportionment Cases*, 144.

[131] Clayton Knowles, "Study Details Rural Domination of Most Legislatures in Nation," *The New York Times*, 28 March 1962 p22.

[132] Layhmond Robinson, "22 States Battle on Redistricting," *The New York Times*, 6 August 1962 p 23.

[133] Anthony Lewis, "Historic Changes in the Supreme Court," *The New York Times*, 17 Junes 1962 p174.

[134] "Momentous Decision," *The Washington Post*, 27 March 1962 A14.

[135] Robert E. Baker, "Court Ruling Bolsters Area Cry for Change," *The Washington Post*, 27 March 1962 A1.

Wall Street Journal noted that though the warnings of Justice Felix Frankfurter, which concerned the inevitable friction of federalism and the proper remedy ought to be the people, the paper noted, "that would be indeed the right remedy, if the states would do it."[136] Further, the paper stated, "there can hardly be any serious arguments about the inequality of the situation, [in Tennessee.]"[137] *The Washington Post* stated that the Court's decision would be welcome, even if it may disturb the peace of mind of judges, and will be successful unless the Court loses its prestige.[138] Further, the report by *The Wall Street Journal* noted that in response to *Baker* governors and state legislators should reapportion "before the Federal Government does it for them."[139] *The New York Times* reminded the New York State Legislators it was their "clear duty" to "undertake the correction of existing evils voluntarily" before the judiciary ordered to do so.[140]

Public complaints against the Court's decision argued against the Court's expanded jurisdiction and the disruption of the political process. *The New York Times* reported that after *Baker*, the Justices "added hugely" to its jurisdiction though "exercises in semantics" by Justice Brennan and, consequently, the High Court would possess the

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[136] "The States' Long-Neglected Business," *The Wall Street Journal,* 28 March 1962 p16.

[137] "The States' Long-Neglected Business," *The Wall Street Journal,* 28 March 1962 p16.

[138] "Momentous Decision," *The Washington Post,* 27 March 1962 A14.

[139] "The States' Long-Neglected Business," *The Wall Street Journal,* 28 March 1962 p16.

[140] "The Legislature's Obligation," *The New York Times,* 28 March 1962 p38.

power to "decide which kind of apportionment is 'rational' and which is not."[141] *The New York Times* quoted Senator Richard B. Russell, (D-GA) who charged that Baker provided, "another major assault on our constitutional system," and threatened the rights of citizens and "the cornerstone of our great civilization," the system of checks and balances, "which the majority of the Supreme Court has set out to destroy." Russell added, "if the people really value their freedom… they will demand that the Congress curtail and limit the jurisdiction being exercised by this group before it is too late."[142]

Prophetically, *The Wall Street Journal* discussed the ways in which *Baker* could transform the political landscape and the distribution of power in the state legislatures. The paper stated that Baker would allow:

> Metropolitan liberals to wrest control of some state legislative bodies from the rural Republicans in the North and West and from conservative Democrats in the South; lead to great state spending on such urban problems as transportation, schools, slum clearance; bring new prestige, power and patronage to metropolitan political machines as that gain strength in state legislatures; and trigger more rapid desegregation efforts in the South as urban leaders gain new leverage vis-a-vis their more tradition bound rural counterparts.[143]

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[141] Arthur Krock, "Another Broad Expansion of the Judicial Province," *The New York Times,* 27 March 1962 p30.

[142] "Capital is Split on Apportionment," *The New York Times,* 28 March 1962 p1.

[143] William Beecher, "Political Upheaval," *The Wall Street Journal*, 27 March 1962 p1.

During the 1970s, the Supreme Court's decisions focused on the transfer of power and the attempts to block that transfer as it discussed the consequences of apportionment on according to class, racial conflict, and communities of interest. Another article from *The Wall Street Journal* stated that the transfer of power from rural to urban may allow the political machines in urban areas to gain more power, increasing Washington's power; however, such objections "cannot do away with the basic problem, which is that urban voters have been increasingly disenfranchised over the years." Since the state legislators did not reapportion to provide the voters an opportunity to speak, the state legislatures ensured that the citizens would turn to the federal government as they had no other available means to redress grievances.[144]

Representatives in Tennessee based their favoritism of the decision on its usefulness for their cause. Congressional Republican Howard Baker believed that is was a welcome decision since it would increase Republican representation in the Tennessee.[145] The former chairman of the Republican State Executive Committee Guy L. Smith believed that the decision was the beginning of a "political revolution" that would give representation to "urban areas" and republicans throughout the state, developing into the beginning of a "real two-party system."[146] Through there were no open vows of defiance against the Supreme Court some of the representatives passively discussed their reluctance

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[144] "The States' Long-Neglected Business," *The Wall Street Journal,* 28 March 1962 p16.

[145] Richard C. Cortner, *The Apportionment Cases*, 147.

[146] Richard C. Cortner, *The Apportionment Cases,* 147.

to support the decision. State Representative James H. Cummings, an opponent of reapportionment, stated that the legislature would be at a "complete loss" and the courts would have to take control of the process since the legislature could not decide how to create districts.[147] One rural representative stated that reapportionment would be like integration: "the Supreme Court already has shoved integration down our throats, and now it is trying to do the same with reapportionment…. Apparently its formula s more Negros and less money for rural areas."[148]

In *Baker* v. *Carr*, the Supreme Court develops its authority to enter the political thicket to balance out the power between the states and the people within the states. Because of the judicial precedent established in *Luther v. Borden* and the pre-Reapportionment Revolution cases, the Supreme Court's most important task in these cases is the development of judicial authority to declare apportionment cases justiciable in a legal and not political manner. In order to do this, the Supreme Court redefines the "political question" doctrine, making apportionment a political right and not a political question. Consequently, the Supreme Court diminishes the unchecked power of the state and, seemingly, transfers control of the political process to the people of the states, with the goal of carving out space in American society for political dialogue. Of course, to ensure the transfer of power, the Supreme Court increases the ability f the federal courts to hear challenges to state discretionary power.

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[147] Richard C. Cortner, *The Apportionment Cases*, 147.

[148] Richard C. Cortner, *The Apportionment Cases*, 148.

In addition to transferring power, throughout these reapportionment cases, the Supreme Court develops criteria to judge the enactment of authority and legitimacy in reapportionment and representation cases and, in the process, the Supreme Court reestablishes an ethos of judicial restraint. First, the voters must show the judiciary that the state government discriminates against voters. Second, the voters must show the judiciary that the political process eliminates their voice and the political process is not subject to reform. Simply losing an election is not a criterion for having no voice; however, if the voters show that there is no chance for change and there would be little chance for change without judicial relief, the voters can establish a prima facie case for discrimination. Third, the judiciary must establish that the reapportionment rests primarily in the hands of the state legislatures until the citizens can establish charges of invidious discrimination against the state legislatures. In the process, the Supreme Court balances the rights of the citizens to bring forth claims and the ability of the state legislatures to conduct their constitutional duties.

Yet, missing from this discussing is the focus of representation. One of the major faults of the Baker decision is that it fails to establish a judiciable manageable standard to discern the scope of relief. As the number of legal cases challenging state and Congressional reapportionment rose after *Baker*, it was apparent that the Supreme Court needed to determine the proper resolution for reapportionment. With this in mind, I will now turn to the examination of the meaning of representation, or, the meaning of "One Person, One Vote."

CHAPTER IV

REAPPORTIONMENT, REPRESENTATION, AND THE RHETORIC OF CONSENT: THE INSITUTIONALIZATION OF POLITICAL EQUALITY

This Court's apportionment and voting rights decisions soundly reflect a deepening conception, in keeping with the development of our social, ethical, and religious understanding, of the meaning of our great constitutional guaranties. As such, they have reinvigorated our national political life at its roots so that it may continue its growth to realization of the full stature of our constitutional ideal..... A vote is not an object of art. It is the sacred and most important instrument of democracy and of freedom. In simple terms, the vote is meaningless - it no longer serves the purpose of the democratic society - unless it, taken in the aggregate with the votes of other citizens, results in effecting the will of those citizens provided that they are more numerous than those of differing views. That is the meaning and effect of the great constitutional decisions of this Court. In short, we must be vigilant to see that our Constitution protects not just the right to cast a vote, but the right to have a vote fully serve its purpose.[1]

The fact is, however, that Georgia's 10 Representatives are elected "by the People" of Georgia, just as Representatives from other States are elected "by the People of the several States." This is all that the Constitution requires.... All of the appellants do vote. The Court's talk about "debasement" and "dilution" of the vote is a model of circular reasoning, in which the premises of the argument feed on the conclusion. Moreover, by focusing exclusively on numbers in disregard of the area and shape of a congressional district as well as party affiliations within the district, the Court deals in abstractions which will be recognized even by the politically unsophisticated to have little relevance to the realities of political life.[2]

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[1] *Fortson* v. *Morris*, 385 U.S. 231, 249 – 250 (1966). In *Fortson* v. *Morris*, the Supreme Court ruled that Georgia's method of allowing the state legislature to choose the governor of the state when the candidates failed to received majority of the popular vote was constitutional, overruling the district court's decision. In his dissent, Justice Fortas wrote that this decision violates the "One Person, One Vote" rule of *Wesberry* and *Reynolds* because of the current malapportionment in Georgia, which was being "worked out" after the Supreme Court cases of *Gray* v. *Sanders*, *Fortson* v. *Dorsey*, *Fortson* v. *Toombs*, and *Toombs* v. *Fortson*. Because of the malapportionment the majority of legislatures, who represent the minority of the people, possessed the power to select the governor of the state.

[2] *Wesberry v. Sanders*, 376 U.S. 1, 24 – 25 (1964).

Equality in the Constitution: Lincoln at Gettysburg

On the afternoon of November 19, 1863, President Abraham Lincoln joined in the dedication ceremony for the Battle at Gettysburg, the turning point of the Civil War. On that day, Lincoln was not the featured orator of the day, just an after thought. The featured speaker of the day, Edward Everett, offered an invitation to the unpopular president since Lincoln, after all, was the president of the United States. By inviting President Lincoln, Everett hoped that the president would to offer "a few appropriate remarks" for the occasion but that was all.

Though his speech lasted just under three minutes in length, Lincoln's 272 words proclaimed a turning point for the constitution as he reconstituted the fundamental values of the country as he read a commitment to political equality in to the governing text. President Lincoln's speech symbolized the progression of representative government, beginning with a government created by the founders and ending with a government "of the people, by the people, and for the people." He transformed a Constitution of slavery into a constitution of equality; he reconstructed a Constitution for and of the few to a Constitution for and of the many.

Edwin Black writes that, at key moments in time, individuals confront the choice of defining who they are, what they believe in, and what mark they will leave on history.[3] When making his definitional choice, President Lincoln "concluded the existence of

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[3] Edwin Black, *Rhetorical Questions: Studies of Public Discourse*, (Chicago: The University of Chicago Press, 1992), 21.

slavery presented a consuming crisis in self-definition."[4] According to Gary Willis, Lincoln, "cleared[ed] the infected atmosphere of American history itself, tainted with official sins and inherited guilt. He altered the [constitution] from within, by appeal from its letter to the spirit, subtly changing the recalcitrant stuff of that legal compromise, bringing it to its own indictment."[5] Lincoln's words provided a new way of speaking about the country as he read a principle of political equality into the constitution and, consequently, a principle of democracy to govern the country. Yet, for 100 years, that principle of equality, like the promises of liberty and equality for all, would remain unfulfilled.

While President Lincoln provided a new moral reading of the Constitution in November of 1863, the Supreme Court returned to that reading almost a century later and relied on it to guide its legal decisions. On an ethical level, no longer would the legal document leave individuals at a disadvantage; no longer would the legal document exclude equality; no longer would self-government only apply to those favored by the state. Through the reapportionment revolution, *Gray* v. *Sanders*, *Wesberry* v. *Sanders*, and *Reynolds* v. *Sims*, the Supreme Court reconstituted the United States in Lincoln's vision of a government "of the people, by the people, and for the people." In the process, the Supreme Court institutionalized political equality in the electoral process to preserved the

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[4] Edwin Black, *Rhetorical Questions*, 23.

[5] Garry Willis, *Lincoln at Gettysburg: The Words that Remade America*, (New York: Simon and Schuster Paperbacks, 1992), 38.

right to vote as the "basic political right" since it preserves all rights.[6] No longer would citizens understand representation and democracy in terms of the discretion of the state legislatures; instead, after the Supreme Court's decisions, the meaning of democracy would occur through understanding of the citizens' experience of democracy. Consequently, the legitimacy of democracy would concern how the availability of the democratic experience to the greatest number of individuals as possible at all levels of government.

The Supreme Court's decisions in the Reapportionment Revolution serve as a means by which the majority of the Supreme Court provides the new moral and legal characteristics of representation for state and congressional districts. At issue in these decisions are the meaning of representation and the notion of consent between citizens and their legislators. In this debate, the Supreme Court attempts to balance out the competing interests of the equality of the citizen to engage in representation and the liberty of the state to conduct representation. Through these decisions, the Court concerns itself with the institutionalization of political equality as the guiding characteristic of representation, allowing for citizens to engage in the present rather than have self-government dictated from voices in the past. Through the reapportionment decisions, the Court characterizes representation as a process by which deliberation is to occur without interference of the state to prefigure the results by privileging interests. In the balance lies, on one side, the characterization of our political institutions as republican

[6] *Wo* v. *Hopkins*, 118 U.S. 356, 300 (1886).

in nature as representatives seeks to defend interests and the characterization of our political system as democratic in nature as representatives seek to defend citizens. In the Reapportionment decisions, the majority of the Supreme Court chooses the later and seeks to use reapportionment as a way in which to provide citizens a public space for dialogue. Yet, these decisions do not eliminate the legislature's ability to promote interests or pursue rational or objective interests within the state; these decisions provide a way for citizens to engage in the process to exert influence on elections without the coercion of the state legislature to decide the outcome of the elections and, hence, the focus of the state, without consent from the citizens.

Noting the connection between the performance of public address and the development and understanding of political philosophy, Michael William Pfau argues that the understanding of republicanism centers on an understanding of time. Pfau writes that "time is the dimension of civic republican political theory most productive for developing interpretive theories to account for the complex internal dynamic of rhetorical texts."[7]

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[7] Michael William Pfau, "Time, Tropes, and Textuality: Reading Republicanism in Charles Sumner's 'Crime Against Kansas," *Rhetoric and Public Affairs* 6.3 (2003): 387. Drawing from the work of J.G.A. Pocock and Michael Leff, Pfau focuses on the relation of time and mortality in political thought and public address to develop an interpretive theory of understanding republicanism since, "the nexus of Pocock and Leff suggests the promise of reading orations as iconic representations of civic republicanism's 'problem of time' and republicanism's assumptions about the cycles of decay through which all republics must pass indicate the connection between this political theory and the pedagogical and hermeneutical strategy known as imitation," (387). For Pocock, the problem of time concerns the "problem of maintaining a particular existence, that instability was the characteristic of particularity and time the dimension of instability." See J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, (Princeton: Princeton University Press, 1975), 75 – 76. According to Pfau, "temporal finitude of the oratorical text is at the core of Michael Leff's critical practice," as he connects the "text's time and political time, writing that 'the meaning of the speech progresses through time to reconfigure the audience's perception of both space and time relative to public events.," (387). See Michael C. Leff, "Rhetorical Timing in Lincoln's 'House Divided' Speech," *The Van Zelst Lecture in Communication* (Evanston, IL: Northwestern University School of Speech, May 1983), 5.

Building upon Pfau's work, I argue that the necessary understanding of the meaning of our Constitutional democracy rests upon our understanding of the democratic experience necessary to sustain it. In the Supreme Court's Reapportionment Revolution cases, the opinions by the Supreme Court Justices reconstruct the characterization and process of representation, focusing the meaning of democracy on the greatest quantity of participants to ensure a legitimate form of government. First, I will examine the social context of the revolution to show why the Supreme Court needed to provide a coherent vision of representation through the development of legal standards. Second, I will examine the institutionalization of political equality and the characteristics of representation necessary for the democratic experience. Third, I will examine how the institutionalization of equality alters the political institutions at the federal, state, and local level, especially in relation to the implementation of rationally objective apportionment plans. I will begin first with a discussion of the narrative of progression in representation, which provides presence to the Supreme Court's understanding of the meaning of representation.

Social Context: The Advent of the Democratic Experience

Competing Perspectives of Representation

In *Baker*, the Supreme Court decided to allow the lower courts and the state legislatures to develop an rational standard appropriate to the exigencies and needs of the state rather than create a uniform judicially manageable standard for all states. Of course, it did not take long for the issue to return to the Supreme Court. Within a year after the

Supreme Court's in *Baker*, petitioners filed 75 cases throughout the country.[8] Within two years of *Baker*, petitioners challenged districting plans in 41 states.[9] In those cases, the lower courts found 26 apportionment schemes unconstitutional even without a judicially enforceable set of standards under the Equal Protection Clause and not knowing what constituted an appropriate deviation from "equal protection," whether or not equal protection applied to both houses, and whether or not the people of a state could protest inequality of representation.[10] Without clear standards, the reapportionment problem returned to the Supreme Court.

The fact that before *Reynolds* the government in any form— whether it were legislative, judicial, or executive— and at any level— whether it were county, state, or federal— failed to determine the meaning of representation is hardly surprising. The Supreme Court's uncertainty about a judicial manageable standard symbolizes the general uncertainty about representation throughout the history of the United States. This uncertainty develops from competing perspectives over the implementation of representation and the refusal to adopt the one representative anecdote to determine the scope of representation within the United States. Yet, the disagreements themselves become instructive as they contribute to the mythos of representation in the American system of government. This development of an American mythos, according to Bruce

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[8] Howard Ball, *The Warren Court's Conceptions of Democracy: An Evaluation of the Supreme Court's Apportionment Opinions*, (Rutherford: Fairleigh Dickinson Press, 1971), 139.

[9] Howard Ball, *The Warren Court's Conceptions of Democracy,*" 139.

[10] Howard Ball, *The Warren Court's Conceptions of Democracy,* 139 – 140.

Ackerman, fosters a collective self-definition and its "re-telling plays a critical role in the ongoing construction of national identity."[11] Narratives, according to Hayden White, are not a neutral discursive form but rather they reveal ontological and epistemic choices with "distinct ideological and even specifically political implications."[12] In both legal and political forms, the history of representation in the United States is the story of inclusion and exclusion of voices in participatory government at the expense of partisan interests. While the ideals of the country, such as the equality of "All *Men*" in the Declaration and "We the People" in the Constitution, expressed one narrative, the political reality displayed another narrative.

Historically, electoral requirements in the early Republic served to exclude rather than include citizens from civic participation. Under the original Constitutional order, the Republic denied blacks and women the rights to vote, protected a group right to vote via the slave owners' codification of the unnamed "Persons," and provided for the protection of state interests via the Senate. Some of the Founding Fathers distrusted democracy, e.g. James Madison and Elbridge Jerry,[13] and allowed for the necessary exclusion of voters from the polls. State requirements allowed only freeholders, i.e. the landed gentry, to vote

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[11] Bruce Ackerman, *We The People: Foundations*, (Cambridge: The Belknap Press of Harvard University Press, 1991), 36.

[12] Hayden White, *The Content of the Form: Narrative Discourse and Historical Representation*, (Baltimore: The Johns Hopkins University Press, 1987), ix.

[13] Elbridge Gerry feared the "danger of the leveling spirit" and believed that the "evil we experience flow from an excess of democracy." See James Madison, *Notes of Debates in the Federal Convention of 1787*, (New York: W.W. Norton & Company, 1966), 655. In Federalist X, James Madison expressed fear that the majority would intrude on the rights of the minority, especially in regards to property rights. See James Madison, "Federalist X," in *The Federalist,* ed. William Brock, (London, Phoenix Press, 2000), 41 - 48.

because they possessed a stake in society.[14] Since non-freeholders possessed no stake in society, conventional wisdom dictated that they were political slaves and their voice could be purchased and controlled. Further, in some states, certain religious believers were denied the right to vote, though those restrictions diminished over time.[15]

For those who could vote, especially for representatives to serve in Congress, equal representation was important, as was the protection of partisan interests. During the Constitutional Convention, the delegates agreed that the number of constituents for representation should not exceed 30,000 inhabitants per representative, which implied political equality.[16] Yet equally important was the protection of certain interests, the Constitution provided for an institutional means of balances interests between the North and the South as the agreement over the Constitution and the presidential election system represented allowed for the protection of Northern interests and free states in the Senate while the House allowed for the protection of Southern interests and slave states.[17] One way of understanding the Federal Constitution and state constitutions is to see them as a means to preserve competing ideologies over representation.

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[14] Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States*, (New York: Basic Books, 2000), 5.

[15] Alexander Keyssar, *The Right to Vote:* 7.

[16] James Madison, *Notes of Debates in the Federal Convention of 1787*, 655.

[17] Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil*, (New York: Cambridge University Press, 2006), 103. According to Graber, Southerners expected the population in the South to grow and population in the North decline. Further, the Southerners did not expect the growth of population in the West, which diminished the power of the South. Yet, it is uncertain if the Founders believed that the Constitution would lead to the expansion of slavery, the limitation of slavery, or the expulsion of slavery.

While the original set of compromises allowed for the exclusion of voices, over time, the States and the Constitution allowed for the extension of voices via the rights to vote, though the extension for one group did not meant the extension of the right to vote for other groups without a voice. According to Alexander Keyssar, during the early 19th century, the right to vote extended to new groups because of socioeconomic and institutional developments such as, "widespread change in the social structure and social composition of the nation's population; the appearance or expansion of conditions under which the material interests of the enfranchised could be served by broadening the franchise of; and the formation of broadly based political parties that competed for vote."[18] By the middle of the 19th century, the right to vote extended to mechanics, non-freeholders, blacks— who were not slaves—, and immigrants. By 1870, the Constitution protected the right to vote for blacks via the 15th amendment, though that right has been tampered with throughout the country, especially in the South. By 1920, the right to vote was extended, graciously, to women via the 19th amendment. By the 1960s, the right to vote was near universal within the United States.

As this historical record suggests, the original understanding and application of the right to vote has been in conflict with the extension and progression of the right to vote. Throughout the history of suffrage in the United States, the right to vote moved from a social and political right to a fundamental right; the right to vote encompassed both a political language and a legal language. Because of the conflicting standards and

[18] Alexander Keyssar, *The Right to Vote:* 34.

applications of the right to vote and the desire to deny the right to vote, the political branches left open a door for the judiciary to provide an authoritative interpretation to the meaning of representation so long as the judiciary did not instruct the legislature on how to represent. As the competing narratives reached the Supreme Court in the 1960s, the Supreme Court faced competing rhetorical dilemmas as to how the Supreme Court ought to write about representation. Should the Court reconsider its decision in *Baker* and remove itself form the political thicket, allowing the states to determine their own course of action? Should the Supreme Court allow the inferior courts to develop their own standards, which would allow competing standards of representation and, possibly, discrimination in the states? Which vision of suffrage would be more important: the original narrative of exclusion, the narrative of state discretion, or the narrative of progressive and inclusion? It is these questions that faced the Supreme Court during the next round of reapportionment decisions.

Legal Context of the Reapportionment Revolution

In November of 1963, the Supreme Court heard oral arguments in *Wesberry* v. *Sanders*, 376 U.S. 1 (1964) and, in February of 1964, decided not only that congressional reapportionment was justiciable but also that the Constitution *intended* the establishment of the "One Person, One Vote" rule. *Wesberry* developed from a malapportionment claim as voters from Georgia argued that population disparities in electoral districts debased

their votes and, in addition, 30 years of legislative inactivity worsened the disparities.[19] The District Court ruled that even though there were great disparities, this case constituted a political question and it could not decide this case for want of equity. The majority of the Supreme Court disagreed. In the majority's, Justice Black rejected Justice Frankfurter's opinion that only Congress possessed "exclusive authority" under Article I, 4 to protect "the right of citizens to vote for Congressmen," and stated that since *Marbury* v. *Madison* the Supreme Court defended constitutional rights from "legislative destruction" and "the right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I."[20] After *Wesberry*, the governing standard of Article I, 2, which states Representatives be chose "by the People of the several" means "as nearly as is practicable " that "one man's [sic] vote in a congressional election is to be worth as much as another's,"[21] making the "One Person, One Vote" rule applicable to Congressional electoral districts.

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[19] *Wesberry* v. *Sanders*, 376 U.S. 1, (1964). Prior to *Wesberry*, the last apportionment occurred in 1931. The petitioners' electoral district, the fifth district, contained 823,680 persons, the ideal or ideal district contained 394,312, and a rural district, the ninth district, contained 272,154. The petitioners alleged that the State deprived them of the right to vote on the basis of Article One, Section Two, the Equal Protection, the Due Process, and the Privileges and Immunities Clauses of the fourteenth amendment, which "provides that 'Representation shall be apportioned among the several States according to their respective number," (3).

[20] *Wesberry* v. *Sanders*, 376 U.S. 1, 6 - 7 (1964).

[21] *Wesberry* v. *Sanders*, 376 U.S. 1, 7- 8 (1964). Justice Black states that in the early Republic, statewide elections did not diminish the value of a ballot as the reliance on single member districts did in *Wesberry*: "To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected "by the People," a principle tenaciously fought for and established at the Constitutional Convention," (8).

In 1964, the Supreme Court applied the "One Person, One Vote" rule to both houses within a state government in *Reynolds* v. *Sims*.[22] According to Chief Justice Earl Warren, the decision in *Reynolds* placed in importance only behind the Supreme Court's decision *Baker* as it represented Warren's fundamental commitment to fairness and democracy.[23] The legal action in this base began before the Supreme Court's decision in *Baker* and continued two-year past as the courts involved deferred to both the decisions of the Supreme Court and the discretion of the state legislature. Like *Baker*, in *Reynolds* voters alleged serious vote dilution and debasement due to legislative inaction. Despite requirements by Alabama's constitution for representation to be based on population and in accordance with the census, the Alabama state legislature protected counties and failed to reapportion from 1901 to 1961.[24]

After a hearing in a district court after the Supreme Court's decision in *Baker*, the state legislature attempted to resolve the apportionment problem to satisfy the state and

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[22] Reynolds was one of six apportionment cases the Supreme Court handed down on the same day. On June 15th, 1964, the Court released decisions in six reapportionment cases over reapportionment controversies in Alabama, Delaware, Virginia, Maryland, New York and Colorado.

[23] Jim Newton, *Justice for All: Earl Warren and the Nation He Made*, (New York: Riverhead Books, 2006), 425.

[24] *Reynolds* v. *Sims*, 377 U.S. 533, 539 - 540 (1964). Pursuant to the Alabama constitution, the Alabama legislature consisted of 106 representatives and 35 senators for the State's 67 counties with each county in Alabama receiving one representative and each senatorial district receiving one senator. For the Senate, each district should be "as nearly equal to each other in the number of inhabitants," and receive one representative; for the House, "representation in the legislature shall be based on population, and such basis of representation shall not be changed by constitutional amendments." The plaintiffs in the case alleged, first, that since population growth in the counties developed unevenly, populous counties were subject to serious discrimination; second, the failure of the legislature to reapportion denied the voters "equal suffrage in free and equal elections…and the equal protection of the laws," in violation of both the constitution of Alabama and the constitution of the United States via the fourteenth amendment; and, third, the voters exhausted all other forms of relief and the Alabama legislature demonstrated clearly, by their inaction, no reapportionment would occur, (540).

federal requirements of equal population or, at the very least, follow Justice Clark's suggestion in *Baker* and relieve the most "egregious discrimination" by "releasing the strangle hold on the legislature sufficiently so as to permit the newly elected body to enact a constitutionally valid and permanent reapportionment plan."[25] However, the State legislature refused to comply. Under an "extraordinary" legislative session in response to the District Court, the Alabama Legislature developed two reapportionment plans but neither completely solved the inequality of representation. The first proposed was the "67-Senator Amendment," which gave each county one senator and one representative and allocated the remaining 39 members of the House based on population. The second proposal, the "Crawford-Webb Act," which would take effect in 1966 if the Amendment failed, called for the creation of 35 senatorial districts with each district receiving one senator, and apportioning the 106 members of the House so that each county would receive one member and the other 39 would be based on a rough population basis. The District Court ruled that neither plan met the necessary constitutional requirements since 25.1% of the population resided in districts represented by a majority of the members of the Senate and only 25.7% of the population resided in districts that could elect a majority in the House.[26] Consequently, the lower court ordered a temporary plan based

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[25] *Reynolds* v. *Sims*, 377 U.S. 533. 543 (1964).

[26] *Reynolds* v. *Sims*, 377 U.S. 533 (1964). According to Reynolds, Population-variance ratios of up to about 41-to-1 existed in the Senate, and up to about 16-to-1 in the House. Bullock County, with a population of only 13,462, and Henry County, with a population of only 15,286, each were allocated two seats in the Alabama House, whereas Mobile County, with a population of 314,301, was given only three seats, and Jefferson County, with 634,864 people, had only seven representatives. With respect to senatorial apportionment, since the pertinent Alabama constitutional provisions had been consistently construed as prohibiting the giving of more than one Senate seat to any one county, Jefferson County, with over 600,000

on 67-Senator Amendment and the Crawford-Webb Act for the November 1962 elections. After the elections of 1962, the legislature failed to adopt a reapportionment plan, and the legislature, which meets biannually, would not meet until 1965. Furthermore, no other political remedies were available since Alabama does not allow for initiative procedures, constitutional amendments needs the support of three-fifths of both houses and approval from the majority of the people, and a constitutional convention needs the support of the people and a majority of both houses. As a result of the facts of the case, the Supreme Court noted probable jurisdiction.[27]

In *Reynolds*, as with the other five cases decided on June 15th, the Supreme Court faced controversies that involved gross malapportionment in voting districts for both Senators and Representatives at the state level. In each case, the Supreme Court ruled that any deviation from "One Person, One Vote," for both the House and the Senate in each state violated the Equal Protection Clause of the fourteenth amendment and, if the judiciary is to consider an apportionment plan for one house in a state, it must rule on both houses in the state. Further, according to *Lucas* v. *Colorado General Assembly*, 377 U.S.

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people, was given only one senator, as was Lowndes County, with a 1960 population of only 15,417, and Wilcox County, with only 18,739 people," (545 – 546).

[27] *Reynolds* itself involves three cases, Reynolds (No. 23), Vann et al. v. Baggett, Secretary of State of Alabama (No 27), et al., and McConnell et al. v. Baggett, (No. 41). According to Reynolds, "Appellants in No. 23 contend that the District Court erred in holding the existing and the two proposed plans for the apportionment of seats in the Alabama Legislature unconstitutional, and that a federal court lacks the power to affirmatively reapportion seats in a state legislature. Cross-appellants in No. 27 assert that the court below erred in failing to compel reapportionment of the Alabama Senate on a population basis as allegedly required by the Alabama Constitution and the Equal Protection Clause of the Federal Constitution. Cross-appellants in No. 41 contend that the District Court should have required and ordered into effect the apportionment of seats in both houses of the Alabama Legislature on a population basis," (554).

713 (1964), even if the people of a state employ a state initiative to create a system of representation that prefers the protection of interests to equal population, that plan is still unconstitutional.[28]

As the exigence of the Reapportionment Revolution suggests, state legislatures created reapportionment plans to secure the protection of interests over the voice of citizen. In this view of representation, the state legislatures possessed a distrust of citizens to know or to do what is best for the state, which reinforced the anxiety over corruption as a threat to republican governments as those without the ability to cast a meaningful vote did not possess the necessary virtue to sustain a Republic.[29] Citizens were not thought to possess rational or objective interests because they would not do what is best for the state and, instead, pursue policies that would protect self-interest over public good. Urban voters, consequently, received a diminished voice because their interests were separate from the interests of the rural areas or of the state.

Under this view, the state legislatures debased the voter of those in urban areas as state legislatures characterized representation as a process that protects interests and not individuals By favoring interests over people, the state of Alabama enclosed its citizens in a political vacuum, whereby the issues were settled and the interests were favored. This form of representation implied that the state was not neutral as it could proceed to develop the interests that chose regardless of what the population wanted as it denied citizens the choice of determining the focus on the state. Further, it eliminated the possibility for the

[28] *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 736 - 737 (1964).

[29] See J.G.A. Pocock, *The Machiavellian Moment,* ix.

community to even question that the focus of the state should be to preserve the balance between rural and urban and to protect the agricultural industry. Persuasion in this scenario was almost unnecessary, especially throughout the state, since the representatives of the state possessed the power to make decisions for that state without adhering to the wishes of some of the people in the states. Because of this, the Supreme Court provided new guidelines for apportionment decisions in a hope to institutionalize equality. By institutionalizing equality, the Supreme Court hoped that fairness would be the result.

Ideology of Representation: Institutionalizing Political Equality

Debating the Narrative of Representation

In the Reapportionment Revolution, a majority of the Supreme Court provide a corrective reading to the Constitution by basing its argument on the progressive view of representation, restoring the original vision of political equality embedded in the Constitution.[30] As Jonathan W. Still notes there are numerous definitions of political equality, each with their own selections, reflections and deflections, and each with their own analytical problems.[31] In developing his own definition, Stills develops six criteria for

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[30] In the eight "Revolution cases" discussed in the previous section, Chief Justice Earl Warren, Justice Hugo Black, Justice William Douglas, Justice William Brennan, Justice Byron White, and Justice Arthur Goldberg form a consistent majority for the advancement of political equality. Justice Harlan dissents in each case as it is unwarranted judicial power. Justice Clark and Justice Thomas Clark and Justice Potter Stewart alter their vote, dissenting in *Wesberry*, *WMCA*, and *Lucas*. Justice Stewart dissented also in *Tawes*.

[31] Jonathan W. Still, "Political Equality and Election Systems," *Ethics* 91.3 (1981): 375 – 377. Still includes the following definitions of political equality: Robert A. Dahl and Charles E. Lindblom, *Politics, Economics, and Welfare*, (New York: Harper & Bros., 1953), p. 41: "Control over govern- mental decisions is shared so that the preferences of no one citizen are weighted more heavily than the preferences of any other one citizen," with each member having an equal vote, the exact weight of the vote may vary. Giovanni Sartori, Democratic Theory (New York: Frederick A. Praeger, Inc., 1965), p. 335. 6. Austin , "The principle of political equality. . . is that every man counts for one vote, and that one man's vote is the equivalent of the

political equality, universal equal suffrage, equal probabilities, anonymity, majority rule, and proportional representation.[32] Guy-Uriel E. Charles conceptualizes a vision of political equality as referring to any one of the following suppositions: universal equal suffrage where everyone possesses a vote and that vote must be equal; everyone vote must count; all votes must count equally; citizens possess an equal chance to determine the outcome of an election; voters must have equal power to affective legislative outcomes; and equal legislators must possess an equal power in proportion to the population represented.[33] In the Reapportionment Revolution cases, the Supreme Court's establishment of political equality rests on the progressive view of representation, which follows a political culture within the United States that saw a skepticism of democracy but now favors it as being necessary for a legitimate government. The Court's vision of political equality concerns the availability of universal suffrage and the equality of voice in

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next man's;" Austin Ranney and Willmoore Kendall, *Democracy and the American Party System* (New York: Harcourt Brace & Co., 1956), p. 16. "One characteristic that most persons regard as essential to democracy is political equality. A familiar way of describing this trait is 'one man, one vote,' which we take to mean that in a democracy political power must be equally shared by all its citizens, and no man should have any larger a share than any other man." Still argues that these definitions suffer from analytical deficiencies as they do not state their precise criteria for determining political equality and they are insufficient to electoral mechanisms (376 – 377).

[32] Jonathan W. Still, "Political Equality and Election Systems," *385*. The definitions for his criteria: "Universal Equal Suffrage: Everyone is allowed to vote, and everyone gets the same number of votes," (378); Equal Shares: "Each voter has the same "share" in the election, defined as what that voter voted on divided by the number of voters who voted on it,"(378); Equal Probabilities: "Each voter has the same statistical probability of casting a vote which decides the election (under certain assumptions)," (380); Anonymity: The result of the election is the same under all possible distributions of the voters among the positions in the structure of the election system," (383); Majority Rule: "An alternative favored by a majority of the voters will be chosen by the election system," (383); Proportional Group Representation: "Each group of voters receives the same proportion of the seats in the legislative body as the number of voters in the group is of the total electorate," (384).

[33] Guy-Uriel E. Charles, "Constitutional Pluralism and Democratic Politics; Reflections on the Interpretive Approach of *Baker* v. *Carr*," North Carolina Law Review 80 (2002): 1154.

the process in relation to the weight of a vote. Legitimacy for representation and democracy concerns the experience of democracy in relation to the expansion of voting rights to include as many equal voices as possible.

The introduction of political equality as a Constitutional ideology occurs from Justice William Douglas' opinion in *Gray* v. *Sanders*, a case that is not a redistricting case though the majority's opinion conveys the "One Person, One Vote" rule.[34] The guiding principle of this opinion does not concern the original historical narrative of the founding that included the compromises between interests but the correction of those compromises, allowing for the development of the democracy and the protection of the individual's right to vote. According to Justice Douglas, representation in the United States contains a Constitutional telos: "The conception of political equality from the

[34]*Gray* v. *Sanders*, 372 U.S. 368, 371 (1963). In Gray, the state of Georgia, a one-party state, employed a county-unit voting system that weighed votes in a way that allows the rural counties to possess greater voting strength than urban areas, ensuring that the rural counties would elect the candidates of their choice. To show the disparity in the weight of votes, the decision states: "Appellee asserted that the total population of Georgia in 1960 was 3,943,116; that the population of Fulton County, where he resides, was 556,326; that the residents of Fulton County comprised 14.11% of Georgia's total population; but that, under the county unit system, the six unit votes of Fulton County constituted 1.46% of the total of 410 unit votes, or one-tenth of Fulton County's percentage of statewide population. The complaint further alleged that Echols County, the least populous county in Georgia, had a population in 1960 of 1,876, or .05% of the State's population, but the unit vote of Echols County was .48% of the total unit vote of all counties in Georgia, or 10 times Echols County's statewide percentage of population. One unit vote in Echols County represented 938 residents, whereas one unit vote in Fulton County represented 92,721 residents. Thus, one resident in Echols County had an influence in the nomination of candidates equivalent to 99 residents of Fulton County." After the appellee filed suit, the State amended its practice, but the appellee still alleged discrimination: ""There are 97 two-unit counties, totaling 194 unit votes, and 22 counties totaling 66 unit votes, altogether 260 unit votes, within 14 of a majority; but no county in the above has as much as 20,000 population. The remaining 40 counties range in population from 20,481 to 556,326, but they control altogether only 287 county unit votes. Combination of the units from the counties having the smallest population gives counties having population of one-third of the total in the state a clear majority of county units." The appellants in the case, the Chairman and Secretary of the Georgia State Democratic Executive Committee, argued that the county-unit system was not unconstitutional since it was designed "to achieve a reasonable balance as between urban and rural electoral power." The Supreme Court ruled that this practice violated the Equal Protection Clause of the Fourteenth Amendment.

Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."[35] By drawing upon these non-artistic proofs, Justice Douglas relies upon the fundamental values of the United States that these texts reveal as an inventional source on which political equality rests.[36] While Justice Douglas' argument may not follow the logic of the syllogism, his opinion rests on the popular political beliefs of the United States.[37] Combining the political developments of representation through the voting rights amendment, Justice Douglas argues that the legal development of voting rights cases shows that the Supreme Court consistently holds that the right to vote means the ability to cast a ballot and to ensure that the ballot counts equally.[38] As this right to vote progresses through political and legal developments, states cannot employ electoral practices that diminish the right to vote or the measure of that ballot. Even though states posses the right to qualify voters due to age or previous prison records, the states could not debase the right to vote by denying political equality, via malapportionment , to the voter.

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[35] *Gray* v. *Sanders*, 372 U.S. 368, 381 (1963).

[36]In *Gray*, Justice Douglas argues in the context of the transcendental values of Democracy discusses in these texts. In "Vernacular Legal Discourse," Marouf Hasian, Jr. argues that in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), Justice Douglas relies on the word "penumbra" to show that the core, textual rights in the Constitution are not the only rights present, (95). See Marouf Hasian, Jr. "Vernacular Legal Discourse: Revisiting the Public Acceptance of the 'Right to Privacy' in the 1960s." *Political Communication* 18 (2001): 97.

[37] Melvin I. Urofsky, "William O. Douglas as Common-Law Judge," *The Warren Court in Historical and Political Perspectives*, ed. Mark Tushnet, (Charlottesville: University Press of Virginia, 1993) 82 -84.

[38] *Gray* v. *Sanders*, 372 U.S. 368, 380 (1963).

Consequently, with telos of representation, then each aspect of the process of representation is to contain equality. If the district does not possess equality, then the statewide result cannot possess equality. Writing for the majority in *Gray*, Justice Douglas states that when representatives select the geographical unit for representation, citizens in that area must have an equal vote under the Equal Protection Clause: "whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit.... The concept of 'We the People' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications."[39] The legitimacy of elections in a representative democracy requires that the part, the electoral district or the voter, receives the same treatment as the whole, the total of districts within the state or all the voters in the state. Denying equality in one district would lead to the denial of equality throughout all of the districts in the state.

While Justice Douglas begins the narrative of progress concerning state action in *Gray* v. *Sanders*, Justice Hugo Black modifies the argument for Congressional action in *Wesberry* v. *Sanders*. In *Wesberry*, Justice Black confronts the delicate task of discussing the malapportionment of a co-equal branch of government, a result that Justice John Marshall Harlan declares is a political question since the Court's decision would alter the composition of a co-equal branch of government.[40] Rather than framing his decision on the progress of representation, Justice Black argues against its dialectical counterpart,

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[39] *Gray* v. *Sanders*, 372 U.S. 368, 379 - 380 (1963).

[40] *Wesberry* v. *Sanders*, 376 U.S. 1, 20 - 21 (1964). Justice Harlan states that the majority's decision would alter the validity of 398 Representatives from 37 states, leaving only 37 legitimate congressional districts.

electoral retrogression, which violates the inherent Constitutional norm of political equality for Congressional elections. In his opinion, Justice Black presents an enthymatic jeremiad as he declares that the Constitution intends for the establishment of the "One Person, One Vote" rule for interpretation, returning representation to its original sacredness. By reconceptualizing the original understanding of Article I, 2, Justice Black's decision commits itself to a vision of democracy constituted by an ideology of political equality contained within the narrative of progress, which also provides the authority of the Supreme Court to determine Congressional apportionment cases justiciable.

According to Justice Black's opinion in *Wesberry*, since the Supreme Court previously entered this area of law in *Smiley* v. *Holms* and *Baker* v. *Carr*, then the Supreme Court is correct in continuing its pursuant to protect voting rights from "legislative destruction."[41] Since the Supreme Court possesses the necessary authority to determine the case, then the issue in *Wesberry* concerns the location of political equality within the Constitution, which Justice Black interprets in Article 1,2's command that Representatives must be chosen "by the People of the several states,"[42] reaching the conclusion that if the Constitution "intends that when qualified voters elect members of Congress," [43] then the weight of that vote must equal as nearly as is practicable.[44]

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[41] *Wesberry* v. *Sanders*, 376 U.S. 1, 6 (1964).

[42] *Wesberry* v. *Sanders*, 376 U.S. 1,8 (1964).

[43] *Wesberry* v. *Sanders*, 376 U.S. 1,8 (1964).

[44] *Wesberry* v. *Sanders*, 376 U.S. 1,8 (1964).

Continued inequality, Justice Black writes, would contradict, "our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People,' a principle tenaciously fought for and established at the Constitutional Convention."[45]

To support his proposition about Article 1, 2, Justice Black employs selective historical arguments that serve as the covenant between the Constitution and the people: Upon ratification, political equality provided the foundation for the constitutional requirement for representation. In the beginning of his opinion, Justice Black notes that state-wide elections, a "widespread practice in the first 50 years of our Nation's history,"[46] rests on the accepted notion of political equality. Turning his attention to constitutional design, he argues that when the delegates at the Constitutional Convention accepted the Great Compromise, consensus rests that no state would be deprived of equal representation in the Senate and no person would be deprived of equal population in the House as representatives would be, "apportioned among the several States… according to their respective Numbers."[47] The purpose of the census, according to Edmund Randolph, is to secure "fair representation of the people," ensuring, according to James Madison, that "numbers of inhabitants should always be the measure of representation in the House of

[45] *Wesberry* v. *Sanders*, 376 U.S. 1, 8 (1964).

[46] *Wesberry* v. *Sanders*, 376 U.S. 1, 9 (1964).

[47] *Wesberry* v. *Sanders*, 376 U.S. 1,13 (1964).

Representatives."[48] According to Justice Black, the discussions of the House as representing the people, the idea of a census to assure a proper counting of the people, provides evidence that the House of Representatives would provide representation to individuals on the basis of "complete equality for each voter," avoiding the problem of representation in Great Britain, where the existence of "rotten boroughs" created disproportional representation. Justice Black further states his case through the words of James Madison in *The Federalist Papers*,[49] speakers at the state ratification conventions,[50] and Supreme Court Associate Justice James Wilson[51], all of whom argued that representation concerned the individual and, hence, political equality for those who could vote. Finally, Justice Black rests his case with a quote from James Madison n Federalist #57 that states, "Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune.

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[48] *Wesberry* v. *Sanders*, 376 U.S. 1,13 (1964).

[49] *Wesberry* v. *Sanders*, 376 U.S. 1,15 (1964): Justice Black cites #57, ""The city of Philadelphia is supposed to contain between fifty and sixty thousand souls. It will therefore form nearly two districts for the choice of Federal Representatives" and #54, ""[N]umbers," he said, not only are a suitable way to represent wealth but in any event "are the only proper scale of representation."

[50] *Wesberry* v. *Sanders*, 376 U.S. 1,16 (1964): According to Justice Black, "Charles Cotesworth Pinckney told the South Carolina Convention, 'the House of Representatives will be elected immediately by the people, and represent them and their personal rights individually.'"

[51] *Wesberry* v. *Sanders*, 376 U.S. 1,16 (1964). According to Justice Black, James Wilson stated, "[A]ll elections ought to be equal. Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same."

The electors are to be the great body of the people of the United States."[52] Consequently, by reaching the conclusions that representation occurs on the basis of political equality, the Supreme Court fulfills the covenant set by the Founding Fathers and declares that the country restore the covenant through the constitutional rule of "one person, one vote."

The beginning of Justice Black's opinion focuses on a dissociation between the foundational values with the Constitution and the actions of partisan agents diminishing the access to those values.[53] While the Constitution intends for a standard of political equality, generations of politicians acting in contradiction to those wishes by advancing partisan concerns, alters the promise of political equality. This argumentative move connects with the premise that "the people" are sovereign, the constitution encodes this sovereignty, and representatives must not interfere with that sovereignty and, when they do, they break the sacred covenant between Constitution and the people. If the Supreme Court is to fulfill its moral obligation of Constitutional interpretation, then the justices must restore the value of equality found within the text of the Constitution.

Further, the rhetorical strategy of the Court connects with the larger cultural beliefs about the political process and the distrust of state legislatures to protect the rights of the people. As Stephen Lucas writes, during the American Revolution the discourse and strategy of the Whigs insists upon "American natural and constitutional rights as the overriding criteria by which acts of Parliament were to be judged and by which resistance

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[52] *Wesberry* v. *Sanders*, 376 U.S. 1,17 (1964).

[53] Chaim Perelman and Lucy Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argument*, (Notre Dame: University of Notre Dame Press, 1969), 411.

to those acts was justified."[54] In *Wesberry*, Justice Black taps into those cultural beliefs in order to provide for a criterion to judge the proper form of representation, and his opinion. Justice Black states that once the delegates to the Constitutional Convention reached the Great Compromise, the delegates determined that representation in the lower House would be based on "the people." Representatives cannot be trusted to protect the rights of the people, especially when the people cannot check their representatives.

By incorporating the Framers and the Federalists, Justice Black reaffirmed the original terms of representation for the House of Representation to argue for political equality. While mathematical precisions may not be possible, the "One Person, One Vote" standard is closer to the original application of representation and more desirable than the political realities of the districts in *Wesberry*. The force of Justice Black's argument suggests that the Founding Fathers created the "One Person, One Vote" criterion for Congressional districts and the Supreme Court is there just to implement their wishes. This argumentative strategy is plausible if the focus is only on Congressional Districts.

Combating the majority, Justice Clark, in his concurrence, and Justice Harlan and Justice Stewart, in their dissents, reject Justice Black's simplification of history and the reinvention of the people under Article One, Section Two.[5556] While the opinions of

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[54] Stephen Lucas, *Portents of Rebellion*, (Philadelphia: Temple University Press, 1976), 60.

[55] *Wesberry* v. *Sanders*, 376 U.S. 1, 19 (1964). Justice Clark rejects the historical arguments of Black in light of Justice Harlan's dissent. However, he accepts that congressional districting is subject to judicial review on that basis that malapportionment counters the equal protection clause of the fourteenth since malapportionment discriminates against citizens and selects some citizens to possess a vote worth more than others," (19) By adopting this line of argument, Justice Clark could still commits to *Baker* on the basis that plans must be rational and districting plans that discriminate are not rational. Justice Stewart accepted the

Justice Clark and Stewart are brief, Justice Harlan provides substantive attacks against the majority and counters the narrative of progress and the commitment to political equality with a commitment to the state legislative discretion backed by other historical arguments and narrow textual arguments. He argues that, according to the view of representation at the time of ratification, representatives were to be apportioned, "largely, but not entirely by population," the Constitution authorizes the states to determine the requirements for representation at their discretion, and Congress possesses the excusive right to check this power.[57] Yet, by rejecting the argument of progress, the ontological consequence of Justice Harlan's legal formalism leads only to the perpetuation of malapportionment, revealing that the foundational law possesses no correlation to the contemporary political realities and that the probability of reform diminishes without judicial backing.

To refute the history of Justice Black, Justice Harlan employs his own historical arguments, refuting the ideology of political equality. He notes that the Delegates to the Constitutional Convention did not discuss Congressional districting let along "One Person One Vote" and the political equality could not have been the norm as the Constitution allocated representation on the basis of the three-fifths clause, which

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notion that the Supreme Court possesses jurisdiction but dissents as he rejects Justice Black's historical interpretation of Article I, 2 (51).

[56] *Wesberry* v. *Sanders*, 376 U.S. 1, 19 (1964).

[57] *Wesberry* v. *Sanders*, 376 U.S. 1, 23 (1964). Accordingly, the appellants have no right to relief as it is beyond the ability of the Supreme Court to decided if "equally populated districts is the preferable method for electing Representatives, whether state legislatures would have acted more fairly or wisely had they adopted such a method, or whether Congress has been derelict in not requiring state legislatures to follow that course. Once it is clear that there is no constitutional right at stake, that ends the case," (24).

protected the Southern interests and a group right to vote.[58] Further, Justice Harlan notes that at the time of *Wesberry* three states possessed representatives though the population of those states existed greatly under the ideal district size, meaning the concept of political equality cannot mean actual equality for ever Congressional districts.[59] For Justice Harlan, while the appearance of *Wesberry* rests on reapportionment, the reality of it concerns the legislative branch as the primary source of Constitutional authority. In this conception, the right to vote, even through the power of apportionment, means what the legislative branches desire it to mean since those possess exclusive authority on its application. In this case, he right to vote means the ability to cast a ballot in a literal sense since, even under the malapportioned plan, the Constitution requires only that the people elect the representatives and the 10 Georgia Representatives were elected by the people.[60] Justice Harlan argues that the majority's decision rests on a misplaced distrust of the legislative process, one that exists outside of the realm of power the judiciary ought to possess. In order to enact this distrust, they must twist the meaning of Article I, 2 and "surreptitiously slip their belief into the Constitution in the phrase "by the People," to be discovered 175 years later like a Shakespearian anagram."[61]

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[58] *Wesberry* v. *Sanders*, 376 U.S. 1, 28 - 30 (1964).

[59] *Wesberry* v. *Sanders*, 376 U.S. 1, 29 (1964). At the time, the ideal district size was 410, 481. Yet, the States of Alaska, Nevada, and Wyoming received one representative each and their state populations were are 226, 167, 285, 278, and 330,066.

[60] *Wesberry* v. *Sanders*, 376 U.S. 1, 24 (1964).

[61] *Wesberry* v. *Sanders*, 376 U.S. 1, 27 (1964).

Justice Harlan's commitment to unchecked legislative supremacy rests on a Catch-22 that prevents political reform. Concluding his opinion, Justice Harlan writes that since Congress possess the power, the people need to force Congress to act: "What is done today saps the political process. The promise of judicial intervention in matters of this sort cannot but encourage popular inertia in efforts for political reform through the political process, with the inevitable result that the process is itself weakened. By yielding to the demand for a judicial remedy in this instance, the Court in my view does a disservice both to itself and to the broader values of our system of government."[62] His selective reading on the Constitution and historical arguments neglect the transcendent cultural beliefs about representation since the Founding, such as the expansion of the right to vote and the expansion of checks on state legislative power through the Civil War Amendments. In addition to ignoring the expansion of the right to vote, Justice Harlan ignores the improbability of political reform. The legal formalism he employs cannot explain the failure of the political process to correct itself as the people cannot "sear the conscience" of their legislators. By enabling a process that refuses to accept deliberation from all citizens as a fundamental goal, the representation crises on the basis of malapportionment will perpetuate ad infinitum. The only recourse Justice Harlan allows for concerns the people's ability to persuade their state representatives or Congress though 60 years of neglect diminishes the strength of this argument.

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[62] *Wesberry* v. *Sanders*, 376 U.S. 1, 48 (1964).

By employing historical arguments to counter Justice Black, Justice Harlan focuses on the notion that the States can conduct representation as they see fit and, if any branch of government is to intervene, Congress is to be that branch. His arguments are not infallible since, in his commitment to legislative supremacy, he ignores the argument that the Founders committed to political equality, at least for those who possessed the right to vote, by calling for strict apportionment of the people where one legislature would represent 30,000 people. If the goal is equal representation, then the means to achieve this goal should reinforce the goal and, though the state legislature possesses the authority to create requirements, apportionment on the basis of one representative for every 30,000 people does not mean that one represent can represents 5,000 citizens and a second represent 55,000. But rather than acknowledge this he chooses to note that the judiciary supersedes its authority as it forces Congress to carry out its responsibilities.[63]

Instead of reinforcing the value of political equality, Justice Harlan reinforces the authority of the state legislature regardless of how they use their power, reinforcing the narrative that the state legislature will abuse its power by disregarding the rights of citizens. While malapportionment may not be as bad in degree as slavery or preventing groups of citizens from possessing the right to vote through literacy tests, poll taxes, or violence, it still falls under the category of preventing individuals from developing and obtaining political equality. Without any deliberative forum to petition, the system perpetuates itself, nullifying the opportunity for persuasion.

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[63] *Wesberry* v. *Sanders*, 376 U.S. 1, 48 (1964).

The Characteristics of Democratic Representation

By selecting a narrative of representation that prioritizes progression and fears retrogression, the Supreme Court reconstitutes representation to concern the Democratic experience. Just as President Lincoln used his Gettysburg address to present the American people with a new moral reading of the constitution to correct the political sins in the country's past, the Supreme Court's decision in *Reynolds* v. *Sims*, 377 U.S. 533 (1964), reinforced and extended Lincoln's vision of equality to all citizens as the decision expanded the political process to those previously denied. The Court reasoned that only a constitution of equality, especially equality of access, protected the civil rights and liberties of all citizens and that constitution. In *Reynolds*, the Supreme Court established four important characterizations of the Democratic Experience: representation as a fundamental right; representation as a means of self-government, which is an individual right; representation as an act that concerns a conception of experience and not a conception of time; and, representation through a procedural construction of the citizen. By refocuses representation to fulfill a democratic experience, the Supreme Court alters the way in which citizens use the electoral process to engage in deliberation and self-government.

First, to develop a notion of equality for all citizens, the Supreme Court reconstitutes representation as a fundamental right of society rather than a political or social right, enhancing the level of scrutiny the judiciary applies to voting rights cases. Fundamental rights concern the individual, exist universally in their application, and

focus on the traditions of the United States, such as freedom of speech, trial by jury, habeas corpus, and, after *Reynolds*, suffrage. Since each citizen possess this right, the state legislators must allow the citizens the ability to exercise this right and to be free from unwarranted discretion by the state legislature.

By grounding his arguments on the narrative of progression, Chief Justice Earl Warren writes that the voting rights cases before the Supreme Court provide evidence of the expansion for the right to and the meaning of suffrage, leading to the idea that the constitution protects the rights of *all* qualified citizens to vote in elections, whether they are state or federal elections.[64] Consequently, voting concerns not only the physical tally of the vote, but the meaning of the vote. The Chief Justice writes:

> History has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.[65]

The problem with malapportionment is that it diminishes the meaning of the vote to a social or political right that depends on the partisan interests of those who control the process. If one vote does not count as much as another vote, then the citizen that casts the vote without as much meaning does not have an equal voice when participating in

[64] *Reynolds* v. *Sims*, 377 U.S. 533, 554 (1964).

[65] *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964).

deliberation about the government or the resources from the state because the state legislators believe that voice is unwarranted in the process. If some citizens do not possess the same voice as others, there is an illusion of representative government, which means that other basic rights are in jeopardy as well: "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society, especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[66] The prior cases before the Supreme Court reflect a desire to limit the development of a political consciousness in the minds of certain voters. Only if voters possess equal access to the ballot box, enjoy liberty to associate and vote independently, and receive equal consideration through the ballot box, will citizens enjoy the fulfillment of self-government and the protection of their civil liberties. This begins by redefining the right to vote as consisting of a fundamental right and not a social or political right.

Second, since the right to vote concerns a fundamental right in the United States, then the way in which individuals exercise that right needs protection. For most citizens, political participation occurs through the elections of representative, which is why the Supreme Court argues the legitimacy of representative government occurs through the meaning, expansion, and protection of the right to vote. Chief Justice Warren writes that while state governments played an important role at the birth of our nation, the evolution

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[66] *Reynolds* v. *Sims*, 377 U.S. 533, 561 - 562 (1964).

of the country favors the role and expansion of the individual as in government participation:

> But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.[67]

Since there is a new foci of self-government in the transition from the states to the people, the foundation of representation protects the equality of the voter even through the districting process. Representative government begins with the equality of the individual and, through electoral participation, develops into representation. Legislators, according to the Supreme Court, are to be "responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will."[68] This constitution of government means that the majority of people should elect the

[67] *Reynolds* v. *Sims*, 377 U.S. 533, 565 (1964).

[68] *Reynolds* v. *Sims*, 377 U.S. 533, 565 (1964).

majority of representatives and those representatives should be responsive to the majority of people.[69]

Since legitimacy occurs through the consensus of individuals, the Supreme Court sees itself as the protector of what amounts to be a "natural" or "organic" consensus. Chief Justice Warren writes that, "Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators."[70] While the Supreme Court faces certain limitations, as it cannot legally enforce representatives to represent in a certain way or to represent all of the people, it possesses the ability to protect the institution by interjecting equality into apportionment and legislative districts. In *Reynolds*, voters in Alabama, like the other 49 states, do not possess a democratic town-hall style of meeting whereby the voters choose what is best for the community themselves; individuals are able to participate in government through informal elections. Citizens cannot be deprived of representative government before elections through the manipulation of districts; an individual must possess the same opportunity to influence an election ensure proper representation after the election.

Consequently, as the Supreme Court constructs the concept of self-government within the individual, it attempts to protect the ability of individuals to find their

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[69] *Reynolds* v. *Sims*, 377 U.S. 533, 565 (1964). This last idea will haunt the Supreme Court during the 1970s and 1980s and the Justices will grapple with the "naturalness" of democracy.

[70] *Reynolds* v. *Sims*, 377 U.S. 533, 566 (1964).

respective voices rather than allow state legislators the ability to create and manufacture that voice. State Legislators cannot allow the minority to the power to dominate the majority and diminish the rights of the majority as they must enact laws for all and act as if they are, "collectively responsive to the popular will."[71] By opening the deliberative process to individuals, the Supreme Court allows each individual the opportunity to decide what is appropriate for himself or herself. While some individuals may not participate or not participate "wisely," the choice itself cannot be deprived by state legislators. Elections serve as the mechanism by which voters declare their vision of what would be best for the community but that choice develops at the individual level through the tally of each vote. To circumvent the vote through malapportionment diminishes the voices of the majority of actors and limits the ability of those to engage in self-government.

Third, according to a majority of Justices in the Reapportionment Revolution, representation concerns an act that expands the democratic experience and frees it from the voices of the past. In *Reynolds*, the counsel for Alabama argued against the commands of the state's constitution as the lawyers neglected the document's command for equal population. Instead, the council of the state argued that Alabama's malapportionment was ratified by the people and the chose to record the protection of interests within their constitution when the people first wrote and ratified the state constitution. Since ratification, all further interpretation would be subject to the initial ratification and interpretation. Yet, the Supreme Court rejected this reading of Alabama's electoral

[71] *Reynolds* v. *Sims*, 377 U.S. 533, 565 (1964).

requirements and, in the process, grounds representation in the expansion of the democratic experience, allow for the rapid change in civilization where, "A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated."[72]

The historic argument defending the State of Alabama reveals the potential for the undemocratic nature of historic arguments. Since the people of the present possess no method of initiative or the ability to call for a constitutional convention, the people of the present are governed by the voices of the past. Subsequently, the consent of the governed develops not from the living but from the dead, diminishing the ability of representation to develop and respond to the needs of each individual voter rather than an institution grounded by those who spoke long ago. By reframing the representation from a conception of time to a conception of experience, the Supreme Court alters the appropriate the scope and meaning of consent. In 1824, Thomas Jefferson wrote that the authority of the people would prevent the ability of the past to bind future generations: "Rights and powers can only belong to persons, not to things, not to mere matter, unendoewd with will. The dead are not even living things. The particles of matter which composed their bodies, make now of the bodies of other animals, vegetable, or minerals, of a thousand forms."[73] While Jefferson wrote of the prioritization of the states in relation to the federal government, he affirms the necessity of experience over time. While the past

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[72] *Reynolds* v. *Sims*, 377 U.S. 533, 567 (1964).

[73] Thomas Jefferson, "To Major John Cartwright," 5 June 1824 in *Thomas Jefferson, Writings* ed. Merrill D. Peterson (New York: Library of Congress, 1984), 1493.

may influence the decisions of the present as the particles of the deceased provide sustenance to life of the present, the voices of the past cannot govern the living. Each generation, for Jefferson, must choose its own path and recognizes the inalienable rights of citizens, which in this case concerns the right to vote. In *Lucas* v. *Colorado General Assembly*, 377 U.S. 716 (1964), the Court recognizes this conception of representation as it rejects the ability of the citizens of Colorado, even through a referendum process, to constitutionalize representation in the past and protect the interests of the state.[74]

Of course, it is not clear in *Reynolds* the extent to which the State can ground representation on experience, especially in relation to how a reapportionment plan at the beginning of a decade slowly becomes governed by the voices of the past. Chief Justice Earl Warren notes that the states can "adopt some reasonable plan for periodic revision of their apportionment schemes," to correct shifts in population within the state and favors the tradition of apportionment after each census.[75] Yet, the Chief Justice also warns against frequent apportionments on the need for "stability and continuity in the organization of the legislative system," as well as the constitutionally suspect avoidance of

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[74] During the 1962 elections, Colorado voters decided the fate of two Amendments to the Colorado constitution on apportionment: Amendment 7, which the voters accepted, provided for apportionment in the House by population and the Senate by the traditional factors such as population as well as geographical, topographical, historical, and economical factors; Amendment 8, which a majority of voters rejected, apportioned both the House and the Senate based on population. The majority of the Supreme Court held that the Colorado apportionment under Amendment 7 was unconstitutional since it denied equal representation to both houses since representation in the Senate was not based on population. In its opinion, the Court ruled that even though the voters of Colorado created a political solution to the problem, the solution needed to be Constitutional.

[75] *Reynolds* v. *Sims*, 377 U.S. 533, 583 (1964).

reapportionment.[76] As the Supreme Court would note in *L.U.LA.C.* v. *Perry*, apportionment plans exist on the legal fiction that the plan at the end of the decade is as constitutional apportioned as the plan at the beginning of a decade.[77] Successive Supreme Courts have allowed the local courts to follow the state constitutions over these considerations. In 2004, the State Supreme Court of Colorado struck down a mid-decade reapportionment plan since the state constitution requires apportionment to occur after the census, rebuffing the attempts of Republicans to gain control of the redistricting process before the 2010 census.[78] However, in Texas, the Supreme Court allowed a mid-decade apportionment plan since there is not prohibition against it. Further, the Supreme Court's precedent allows for state legislators to act as the primary authority in redistricting, even if it is to correct errors in previous districting plans, to create a new plan

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[76] *Reynolds* v. *Sims*, 377 U.S. 533, 583 – 584 (1964).

[77] *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399,421 (2006).

[78] Greg Giroux, "Supreme Court Rebuffs Effort to Revive Colorado GOP's Mid-Decade Remap," *Congressional Quarterly* 5 March 2007, Accessed at: http://cqdevsite.wms.cdgsolutions.com/wmspage.cfm?docID=news-000002462707; Linda Greenhouse, "Colorado Republicans Lose Redistricting Effort," The New York Times 8 June 2004. Accessed at http://query.nytimes.com/gst/fullpage.html?res=9C05E4DD1F31F93BA35755C0A9629C8B63. According to CQ, the Republicans attempted to redistrict to protect Bob Beauprez, who won a new district by 121 votes in the 2002 election. Rep. Beauprez won reelection in 2004 by 29,500 votes but lost reelection in 2006 by over 24,000 votes. The Supreme Court refused to grant cert in the case, falling one vote shy of hearing the decision. The petition, which stated that the Republican legislature could redistrict the state after the state implemented its first redistricting plan on the basis that the Constitution allows for state legislatures to make rules for elections under the "elections clause" of Article I, 2, sough to cert to overturn a decision by the Colorado State Supreme Court, which ruled that the state constitution allows for redistricting only after the census and not mid-decade. The Supreme Court considered the petition during five consecutive weekly conferences, before being rejected on a 6 – 3 vote, with Chief Justice Rehnquist, Justice Antonin Scalia and Justice Clarence Thomas dissenting. In his opinion, Chief Justice Rehnquist stated that the Colorado Supreme Court made a "debatable interpretation" of federal law concerning court-ordered redistricting.

when the judiciary developed a previous plan, or to institute a plan with partisan purposes.[79]

Fourth, when characterizing representation the Supreme Court defines the citizen in procedural terms, altering relationships between the citizen and the legislator to the extent that deliberation can occur between the people and the legislators. While it is a political good that the Supreme Court fails to impose a political philosophy[80] or dictate to representatives how they must represent as it would encroach on both the separation of powers and the relationship between the federal government and the states, the Supreme Court fails to understand the meaning of the individual in political society, discussing citizenship only in procedural rather than substantive terms.

In *Reynolds*, the Chief Justice Warren declares that the substance of the act representation is on the people and not interests: "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system."[81] The Court continued as it stated: "Citizens, not history or economic interests, cast votes.

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[79] *League of Latin American Citizens* v. *Perry,* 548 U.S. 399, 421 - 423 (2006).

[80] *Reynolds* v. *Sims*, 377 U.S. 533, 566 (1964). Chief Justice Earl Warren displays a rhetorical self-awareness by mentioning that it would exceed the authority of the Supreme Court to impose one political philosophy even as the decision in *Reynolds* alters the form of representative government.

[81] *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964).

Considerations of area alone provide an insufficient justification for deviations from the equal-population principle. Again, people, not land or trees or pastures, vote." Chief Justice Warren's quotes on the Court's constitutional duty and representation rebuked not only the state legislators, but also the thoughts of Justice Frankfurter, who favored legislature discretion to promote valuable state interests.[82] Yet, his rebuke was selective as it failed to discern the people's role in representation.

Any given act of representation posits a dialectic relationship between the representatives and the represented. The Chief Justice's comments in *Reynolds* creates a division between the legislators and the people, whereby the people refer to the majorities who do not receive effective representation because of interests though there is not dearth of challenges by individuals seeking to protect their interests or even their political party. In order to accept this division though, there needs to be a separation of the individual and interests. To say that "interests" do not vote prioritizes the equality of each voter and entails consequences that the minority should not overpower electorally the majority even as it deflects attention away from the notion that individuals possess political interests and exist inside of a political community. While the Court argues, correctly, that a pasture does not vote—in a literal sense—, it overlooks the conception of the individual whereby the individual votes to protect him/ herself as a farmer, the farm, the family, the pasture, the cows, his or her fellow farmers, the corporations that provide farming equipment, etc. Furthermore, depending on the State, favoring a group of voters may benefit the entire

[82] Jim Newton, *Justice for All*, 424 - 425.

state. In the case of *Baker*, *Gray* and *Wesberry*, the Supreme Court rules that it may be unfair for rural communities to receive greater benefits in infrastructure and education prior to the formation of consensus from all members of the state, and employs *Reynolds* to correct the constitutional defect that prevents consensus through deliberation. As a result, if the rural areas were to be truly important to the community, then the Supreme Court shifts presumption in the debate, forcing the minority of citizens to show why their interests should receive greater recognition in the political process.

Through the Supreme Court's Reapportionment Revolution decisions, the Supreme Court characterizes representation as a fundamental right, the process by which individuals engage in self-government, as an act that occurs the expansion of experiences, and an act that requires citizens and states to be relatively neutral during the process. While the Supreme Court reconstitutes representation within the general value of equality, it diminishes the value of legislative discretion. Consequently, this new priority in values would change the structure in the country's political institutions.

Political Institutions: The Rise of Institutionalized Democratic Equality

With ideology of political equality serving as the Constitutional interpretive key for congressional and state reapportionment decisions, the Supreme Court alters the structure of political institutions to ensure the protection of the democratic experience. By reading political equality into the Constitution, the Supreme Court extends political equality to all political subdivisions that require electoral districts and diminishes the discretion of the state to interfere access to deliberation. Consequently, as the majority of

the Supreme Court favors the privileging of the citizen over the state, it must also find ways in which to create rules and regulations to ensure that there is a space for citizens to engage in dialogue and deliberation and to limit the authority of the state to close access to that democratic space. While the Supreme Court engages in a practice of instituting a democratic experience by diminishing the power of old forms of government, affected most in this transition is the loss of conceptions pertinent to a tradition form republican. As the dissenters note, with the new electoral power of the citizen the states lose the ability to determine its own form of government and to respond to its own regional exigencies. While the dissenters of the judiciary's involvement in reapportionment attempt to define the situation as favoring political equality or legislative rationality, the majority present a way in which citizens possess both political equality and the ability to pursue the rational or objective interests of the states. This process occurs through the rejection of the federal analogy and the rejection of the protection of interests.

Rejection of the Federal Analogy: Diminishing the Power of the States

The reliance on the federal analogy serves as a means to reaffirm the power of state over the power of the citizens with the state and suggest that the states exist as a coequal branch of government. While attempting to restore federal power, i.e. allow the states to respond to the exigencies within the state, the states overextended their argument to suggest that they possess the same power as the federal government to conduct representation, eliminating the Constitutions preamble of "We, The People." By developing the federal analogy, the states sought adherence to an a fortiori argument: if

the federal government can conduct representation in a way in which that denies the people of different states equal representation, the states can develop representation that denies counties equal representation. In the process of enacting this argument, the state legislators conceived of political subdivisions as the host for reception rather than the people who inhabit those geographical areas. Chief Justice Warren redefines them as being "subordinate government instrumentalities created by the State to assist in the carrying out of state governmental functions," rather than being "sovereign entities" in and of themselves.[83] Consequently, the Court hold that Reynolds means that both Houses within a state legislature must be apportioned on the basis of equal population to avoid the protect that a minority receives through malapportionment in one House to veto the legislative will of the majority in another House.[84] Yet, Chief Justice Warren argues that the call for equal population in both Houses will not alter the function of the bicameralism, "to insure mature and deliberative consideration of, and to prevent precipitate action on, proposed legislative measures."[85] The call to apportion on the basis of equality to sure enhance deliberation by creating an experience where more voices, not less, participate in the deliberation of legislation affecting all of the citizens. Chief Justice

[83] *Reynolds* v. *Sims*, 377 U.S. 533, 575 (1964).

[84] *Reynolds* v. *Sims*, 377 U.S. 533, 575 (1964).

[85] *Reynolds* v. *Sims*, 377 U.S. 533, 576 (1964).

Earl Warren notes that even Congress could "insulate states" in order to allow state governments to deprive individuals of constitutional rights.[86]

Second, the reliance on the Federal Analogy serves as a way for the States to argue that exists as a co-equal form of government in the Constitution. By employing this argument, the Alabama sought to equate the state legislators with the Founding Fathers to raise the standing and power of the state to reapportion to pursue rational objectives. To argue that the states possess the same power as the federal government to apportion representation just as the federal government does in the Senate, is to argue that argue that the states possess the same authority to create Constitutionally impermissible malapporitonment at the expense of the people.[87] However imperfect the democratic standards of the Senate are, Chief Justice Warren creates an exception for it as a political institution because without it the smaller states would not have agreed to join the Union.[88] Though the Supreme Court does not possess the authority to alter representation of the Senate because of the separation of powers, the Supreme Court declared in *Baker* that the separation of powers does not extend to the states. While the federal government may be able to discriminate against the people of all of the states by allowing for unequal representation in the Senate, the Supreme Court will not allow the

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[86] *Reynolds* v. *Sims*, 377 U.S. 533, 582 (1964).

[87] For a discussion of the undemocratic nature of the Senate, see Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We The People Can Protect It)*, (New York: Oxford University Press, 2006), 49 – 62. For a milder vision of reform, see Larry J. Sabots, *A More Perfect Constitution: 23 Proposals to Revitalize Out Constitution and Make America a Fairer Country*, (Mew York: Walker & Company, 2007), 23 – 32.

[88] *Reynolds* v. *Sims*, 377 U.S. 533, 582 (1964).

states to do the same, especially since the Constitution of Alabama, and other states, calls for representation in both houses of the states to develop from the people. Consequently, as Chief Justice Warren states, that whether or not reapportionment is a constitutional or statutory requirement, and whether or not the state legislators follow or ignore those commands, any apportionment act concerning both Houses in a state violates the Equal Protection Clause of the Federal Constitution when the goal is not equal population.[89] If federal representation depends on equality, then state representation must depend on equality: "When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls."[90]

If the federal analogy were correct, then the state could have argued that the people of Alabama chose to record the protection of interests within their constitution when they first wrote and ratified the state constitution as the founding fathers wrote and ratified the protection of interests in the federal constitution via the Senate. However, the states could not argue that point since the original constitution of Alabama enacted representation by population, as did the constitutions of 35 other states at the time of *Reynolds*.[91] The most the state could do is argue that since Congress allowed for inequality as a norm through the three-fifths clause, then Congress acknowledged and approved of

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[89] *Reynolds* v. *Sims*, 377 U.S. 533, 584 (1964).

[90] *Reynolds* v. *Sims*, 377 U.S. 533, 584 (1964).

[91] *Reynolds* v. *Sims*, 377 U.S. 533, 573 (1964).

the unequal representation.[92] The Supreme Court rejected the later argument in *Wesberry* as it contradicted the narrative of progress. Further, for the state of Alabama to argue that legislators are only modeling the representation they prefer rather than the representation that appears in the constitution of Alabama is to misread the text of the constitution to pursue partisan interests.

Representation, Rationality, and Equality of Access

With the subordination of the state to the federal government and to the citizens of the state, the Court faces the question to what degree can political intuitions prefigure electoral districts to favor interests over individuals. In this debate, the Supreme Court begins to discuss the identity of the state government as it relates to representation. For the dissenters, Reynolds and the cases in the 1960s provide an opportunity to defend the "republican," as opposed to "democratic," institution of representation that supports the ability of the states and the state legislatures to prioritize the ideology of legislative discretion to pursue objective state interest over the ideology of political equality, even if "legislative discretion" or "rationality" hinders the development of deliberative structures and prevents individuals in their communities from engaging in self-government. "Rationality" allows representation to prefigure electoral districts to ensure a desirable result and subordinate the people to the state and requires the people to adopt the interests of the state in order to receive political recognition.

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[92] *Reynolds* v. *Sims*, 377 U.S. 533, 574 (1964).

When rejecting the One Person, One Vote rule, opponents base their arguments on the impracticality of the implementation of the ideology of political equality through the Court's standard. Though the One Person, One Vote requirement forms the basis for the conscience of American democracy, objection to the call for political equality focuses on the practical considerations of districting and the over-involvement of the judiciary in to democratic politics. Luis Fuentes-Rohwer argues that the Court's decision in *Baker* concerns the development of a rationality test for reapportionment rather than an equal-population requirement and it is in the judiciary's best interest to allow states to follow standards of rationality rather than the rule of equal-population to ensure that state legislators are the primary source of redistricting.[93] John Hart Ely, who supports the Court's involvement to unblock democratic stoppages, states that the One Person, One Vote rule from *Reynolds*, "is certainly administrable. In fact administrability is its strong suit, and the more troublesome question is what else is has to recommend."[94] Sandy Levinson writes that the One Person, One vote mantra presents an inadequate description of who can vote and a poor guide to who can gain access to the franchise.[95] Further, the mantra does not provide a requirement for an equal amount of people in a district, only

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[93] Luis Fuentes-Rohwer, "Equal protection, and the Modern Redistricting Revolution: A Plea for Rationality," *North Carolina Law Review* 80 (2002): 1353.

[94] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, (Cambridge: Harvard University Press, 1980), 121.

[95] Sandy Levinson, "One Person, One Vote: A Mantra in Need of Meaning," *North Carolina Law Review* 80 (2002): 1272 - 1274. Levinson notes that many individuals in society, children, felons, resident aliens cannot participate in elections and, therefore, do not possess one vote. Further, the OPOV requirement exists only in the first election after a census and, after that election, the population changes in each election district alters political equality.

equal constituents.[96] James Gardner states that the One Person, One Vote rule forced governing bodies to create at-large voting systems and force sub-communities to create one large community or to add municipalities to ensure all political subdivisions would be equal in population.[97] The consequence of these choices concerns the break-up of traditional communities and smaller sub-communities. Grant M. Hayden argues though there is widespread acceptance for the ideology, the One Person, One Vote rule does not create a sense of neutrality or objectivity in electoral districts and does not end the practice of vote dilution.[98]

Further disagreement of the rule focuses on the alteration in our political institutions, especially in regards to the value of legislative discretion, which resembles Madisonian representative government whereby legislatures would find ways to balance the interests within a state so long as the balancing did not lead to a non-republican form of government, especially an aristocratic or monarchical government.[99] According to Robert Bork, the work of James Madison suggests that the states, as representative democracies could enact its government in many forms so long as that form is rational.[100]

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[96] Sandy Levinson, "One Person, One Vote: A Mantra in Need of Meaning," 1282.

[97] James A. Gardner, "One Person, One Vote and the Possibility of Political Community," North Carolina Law Review 80 (2002): 1238.

[98] Grant M. Hayden, "The False Promise of One Person, One Vote," *Michigan Law Review* 102 (2003): 215.

[99] James Madison, "Federalist #43: The Powers Conferred by the Constitution Continued," in *The Federalist* ed. William R. Brock, (London: Phoenix Press, 2000), 223.

[100] Robert H. Bork, *The Tempting of America: The Political Seductions of the Law*, (New York: Simon and Schuster, 1990), 87.

It seems that, for Bork, the court ought not to brush aside a state's reapportionment plan if it seeks to protect distinctive economic interests or social views that may disappear in a purely majoritarian legislature.[101] Bork's position enhances the standing of the state by suggesting that states, and not the federal government, serve as the branch of government that represents the people and provides the states more latitude in employing their discretion as the state does not engage in discrimination against the citizen so long as it possesses a rational basis for its political institution.

Alexander Bickel would take Bork's position two steps further. First, according to Bickel, in a purposefully malapportioned legislature, most groups in society have some interest at stake and likely possess the power to conduct some maneuvering for some of their objectives, which may not occur in a majoitarian apportionment plan.[102] Malapportionment is desirable since to some degree—and the degree is not stated— groups can influence and legislatures can balance those interests. Second, in the Madisonian system, Bickel prefers to downplay the role of elections because of the voter. Bickel states:

> Elections, even if they are referenda, do not establish consent, or do not establish it for long. They cannot mean that much, Masses of people do not make clear-cut, long-range decisions. They do not know enough about the issues, about

[101] Robert H. Bork, *The Tempting of America*, 86- 87.

[102] Alexander Bickel, *The Supreme Court and the Idea of Progress*, (New Haven: Yale University Press, 1978), 114. Mark Tushnet arrives at a similar conclusion about the ability of minorities to play a role as a "swing group" necessary to secure legislation. See Mark Tushnet, *Taking the Constitution Away from the Courts*, (Princeton, Princeton University Press, 1999), 159.

> themselves, their needs, and wishes, or about those needs and wishes will appear to them to be two months hence.[103]

Bickel's position defends the notion that representatives act to filter public opinion rather than reflect it. Bickel's arguments rest on the assumption that the legislator would only mirror his/her constituents and not act with any political prudence if the Supreme Court enacts political ideology, though under the apportionment plans in *Baker*, *Wesberry*, and *Reynolds*, the complaint is that representatives mirror the desires and interests of the rural voters unproportionately more than the urban. Further, Bickel claims that the decisions by the Warren Court attempts to "dictate answers to social and sometimes economic problems" through the alteration of "the structure of politics, educational policy, the morals and mores of society,"[104] and interferes with the political process. Because of the absence of knowledge and the incommensurability over the interests of voters, this style of representations slows the passions to allow reason to measure public goods. Political equality would only allow the passions to dictate governmental policy and, consequently, the balance of interests would succumb to the tyranny of the majority. Because of these claims on human nature and the deficiencies of the voters, government institutions need to weigh the costs and benefits of the interest in society without reflecting the passions of the voter.

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[103] Alexander Bickel, *The Morality of Consent*, (New Haven: Yale University Press, 1975), 16.

[104] Alexander Bickel, *The Morality of Consent*, 27.

For the Justices in the Reapportionment Revolution cases, rationality can mean following Constitutional provisions to allowing for legislative compromise. In *Baker* v. *Carr*, Justice Clark states that when a state legislature follows Constitutional standards of equal population, with some minor qualifications, it follows a rational or reasonable plan; when a state legislature fails to reapportion for sixty years and allows vast malapportionemnt, the legislative action is no longer rational.[105] While Justice Clarke despised the "crazy quilt" design of the Tennessee apportionment scheme in *Baker* opinion shows reluctance to impose mathematical equality as a substitute.[106] In *Reynolds*, Chief Justice Earl Warren states that it is rational for state legislators to consider legislative interests in addition to equal population but it cannot subordinate equal population to pursue other legislative interests[107] as the reapportionment plan in Alabama is nothing more than an "irrational anachronism."[108] In *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633 (1964), the Supreme Court ruled that districts in New York State violated the equal protection clause of the fourteenth amendment, overruling District Court's holding that

[105] *Baker* v. *Carr*, 369 U.S. 186, 254 (1962).

[106] *Baker* v. *Carr*, 369 U.S. 186, 258 - 259, (1962).

[107] Reynolds v. Sims, 377 U.S. 533, 566 (1964). Chief Justice Earl Warren does not want the state legislatures to follow "rigid mathematical" formulas but it cannot diminish the meaning of a vote to pursue legislative interests. Further, "citizens, not history or economic interests vote" and the apportionment plans must reflect this or be deemed irrational. In his concurrence, Justice Stewart acknowledges that the failure of the state to reapportion for sixty years is irrational (588).

[108] Reynolds v. Sims, 377 U.S. 533, 570 (1964).

New York's apportionment presented a rational, and not arbitrary, system whereby the state used districts of historical origin that contained no geographic discrimination.[109]

For the dissenters, rationality provides argumentative ground to allow state legislatures the authority to subvert political equality to pursue state interests. In *Baker* Justice Frankfurter, asserts that a state possesses the discretionary power to develop an electoral structure "it thinks best suited to the interests, temper, and customs of its people," though it cannot act "irrationally."[110] He adds that the judiciary ought to provide equal respect to a legislative judgment that chooses to "distribute electoral strength among geographical units, rather than according to a census of population, is certainly no less a rational decision of policy than would be its choice to levy a tax on property rather than a tax on income."[111] Justice Harlan writes that rationality concerns, "not what the State Legislature may actually have considered but what it may be deemed to have considered,"[112] and the protection of rural voices by the refusal to "recognize the growth of the urban population that has accompanied the development of industry," is rational since it reflects a legislative "give-and-take" and compromise.[113] He adds that, "And so long

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[109] *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633 (1964). According to the case, in order to balance out the representation of interests in the state, the rural citizens received 1.5 times the representation of the urban citizens in the state senate.. Further, 37.1% of the population elected the majority of representatives in the house and 40.9% of the people elected a majority in the senate.

[110] *Baker* v. *Carr*, 369 U.S. 186, 334 (1962).

[111] *Baker* v. *Carr*, 369 U.S. 186, 334 (1962).

[112] *Baker* v. *Carr*, 369 U.S. 186, 345 (1962).

[113] *Baker* v. *Carr*, 369 U.S. 186, 348 (1962).

as there exists a possible rational legislative policy for retaining an existing apportionment, such a legislative decision cannot be said to breach the bulwark against arbitrariness and caprice that the Fourteenth Amendment affords."[114] Further, according to Justice Harlan, even if the state legislators denied reapportionment to further their interests and entrench themselves over the voters, it would not be the "business of the federal courts to inquire into the personal motives of the legislators."[115] In *Reynolds*, Justice Harlan notes the abuse of rationality by the majority as the decision of the Chief Justice's position that "a clearly rational state policy" that submerges population is not, "principle of logic or practical or theoretical politics, still less any constitutional principle."[116]

Adherence to the rationality argument allows the states the ability to create political institutions that protect interests and not individuals with few checks on what is rational. Since there are no objective checks on rationality, as rationality depends upon the legislative body enacting a plan on the basis of rationality or the members of the judiciary hearing a case involving the rationality of a reapportionment plan places the Supreme Court in a position where case by case jurisprudence would overpower the judiciary's docket, prevent the Supreme Court from presenting clear, judicial standards to guide lower courts, and potentially diminish the rights of some citizens where the plan

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[114] *Baker* v. *Carr* 369 U.S. 186, 337 (1962). In Gray, Justice Harlan stated, I expressed the view that a State might rationally conclude that its general welfare was best served by apportioning more seats in the legislature to agricultural communities than to urban centers, lest the legitimate interests of the former be submerged in the stronger electoral voice of the latter. See *Gray* v. *Sanders*, 372 U.S. 368, 386 (1963).

[115] *Baker* v. *Carr*, 369 U.S. 186, 337 (1962).

[116] *Reynolds* v. *Sims*, 377 U.S. 533, 623 (1964).

met rationality requirements without political means to challenge the plan. Further, acceptance of rationality by one court may lead to the rejection of rationality by another, potentially necessitating legal challenges because of changes on the Supreme Court.

To advance the argument of rationality, the justices focus on the unique aspects of the redistricting plan to show that the legitimacy of the system develops by the way in which it serves the public. In his dissent in *WMCA, Inc.* v. *Lomenzo*, Justice Stewart argues each systems of legislative apportionment depends on their respective state and geographical region and that, in New York, the state ought to possess the ability to employ malapportionment if it is beneficial for the county system since it serves as a central and efficient institution for carrying out government programs.[117] If the county did not receive the overrepresentation, then it would not be able to provide these resources, as it would lose some of its resources to New York City, New York City, which, "by virtue of its concentration of population, homogeneity of interest, and political cohesiveness," would overpower the rest of the state.[118] In *Avery* v. *Midland County*, 390 U.S. 474 (1968), Justice Harlan presents similar concerns as he states that under the "One Person, One Vote" rule a local government could not create a governing body that would balance the different

[117] *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 761 - 765 (1964). Justice Stewart presented his dissent in the WMCA Inc. case in Lucas. The forms of state aid are found in footnote 18. They are: such as the distribution of state aid for educational extension work, community colleges, assistance to the physically handicapped children, social welfare such as medical aid for the aged, the blind, dependent children, the disabled, and other need persons, public health, mental health, probation work, highway construction, improvement maintenance, conservation, and civil defense preparations.

[118] *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 764 (1964).

interests between a metropolitan area and a suburban area.[119] Important to this conception is that the citizens of a county have multiple interests and these interests may not be reconcilable on their own or with standards of equality. Since the parties involved may not bring equal resources then they may not desire to receive representation on the basis of population alone. In Justice Harlan's suburban and metropolitan example, the city brings the services and the rural areas bring the wealth, an arrangement that would not be possible under *Reynolds*, causing Justice Harlan to reject the Supreme Court's attempt at solving complex social problems with the "simplistic defects" of the "One Person, One Vote" rule.[120] Finally, Attempting to balance the requirements of equal population with rationality, Justice Fortas would extend "One Person, One Vote," to state and congressional districts but disregard for local districts. "Constitutional commandments," Fortas states, "are not surgical instruments. They have a tendency to hack deeply—to amputate."[121] Rather than adopt a blunt instrument to divide communities or adopt a "rigid, theoretical, and authoritarian approach to the problem of local government,"

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[119] *Avery* v. *Midland County*, 390 U.S. 474, 493 (1968), In this decision, the Supreme Court rules that even local governing units must follow the mandate of *Reynolds* even though it would hinder the ability of local governing units to respond to local exigencies. In Midland County, Texas, the Midland County Commissioners Court is the governing body for the county with the responsibilities of maintaining buildings, administers welfare services, determines school districts inside and outside of the city of Midland, and imposes taxes throughout the county. The taxes are applied to everyone in the county though most of the services benefited the rural citizens of the county. Citizens of the county elect the four representatives via districts and a judge at large throughout the county; the population of the electoral districts ranged from 414, 828, 852, to 67,906 persons. According to the "One Person, One Vote," rule, the ideal district size would be 17,500 persons, meaning that the districts deviated -97.3%, -95.3%, 95.2%, and +388% from the ideal, (475 = 477).

[120] *Avery* v. *Midland County*, 390 U.S. 474, 494 (1968).

[121] *Avery* v. *Midland County*, 390 U.S. 474, 497 (1968).

Fortas desires the deployment of reason into the problems of apportionment at the local level.[122]

In these decisions, Justice Stewart, Justice Harlan, and Justice Fortas rely on the rationality argument to explain that citizens possess different interests and the state should possess the discretionary power to weight the elections to protect those interests. Speaking only for himself, Justice Fortas states that the Equal Protection Clause forces unnecessary equality on citizens as it insists that, "each stockholder of a corporation have only one vote even though the stake of some may be $1 and the stake of others $1000."[123] If Justice Fortas is serious in his comment, then there is no need for representation for those with a $1 share for their money will not matter in the marketplace even if they form coalitions to match the voter power of those who possess more in society as those who possess more power will alter the rules yet again with very few changes to ensure that the stock-holders in the lower tier experience a meaningful vote. While noting that citizens possess interests and those interests may be different in rural areas than urban areas, he fails to characterize other differences and even identifications that rural or urban voters possess. Though rural citizens may support rural policies, rural citizens may classify themselves in other terms that the Supreme Court does not consider: party affiliation, social concerns, social services, etc. In addition, while stakeholder theory may relate to the distribution of goods and services that promote agriculture, it does not translate well into education or the prompt collection of taxes, which the MCCC plays a role for both rural and urban areas.

[122] *Avery* v. *Midland County*, 390 U.S. 474, 498 (1968).

[123] *Avery* v. *Midland County*, 390 U.S. 474, 508 (1968).

Further, like other heresthetical designs in districting, it seeks a result without deliberation, allowing those in power to invoke a shareholder qualification on voting whereby if a person lacks political equality, they lack the ability to participate in society and allows them to be "token" members of a political community.

Equal Access for Equal Determination

By rejecting rationality as the Constitutional standard, the Supreme Court rejects the potential for state legislators to employ that argument to diminish the rights of citizens since, as Chief Justice Earl Warren states, "to the extent that a citizen's right to vote is debased, he is that much less a citizen," and that right should not depend on the geographic area in which a person resides.[124] Accordingly, citizens, and not interests must predominate the electoral process before citizens cast their vote as, for the majority, citizenship develops and is expressed by casting a meaningful ballot. For this access to representation there must be a neutral framework, or a government of laws, that guides the process and reduces the ability of citizens, or a government of men, from denying equality to other citizens. If an individual, in terms of his or her vote, is less than an individual through vote dilution, then the civil liberties of that individual can be diminished or reduced. As a result of this decision, a minority cannot make a person into three-fifths of a person; a state cannot violate the federal constitution by making a one groups of citizens three-fifths citizens.

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[124] *Reynolds* v. *Sims*, 377 U.S. 533, 569 (1964).

"Rationality" becomes the empty vessel by which state legislatures, as well as justices not committed to the equality of "One Person, One Vote," prioritize the state or certain interests over the individual. Without any checks and balances, "rational" can mean anything without any political or judicial recourse. For the state legislators in *Gomillion*, the redistricting plan constituted a rational plan. For the state legislature in Tennessee, not apportioning for 60 years constituted a rational act. The problem, as John Hart Ely points out, is that this justification can be extended well beyond the means of the normal "rationality" that the constitution as an authoritative source would prescribe: "If protecting the agricultural economy is truly important to the state, and it obviously is to some, it would not be illogical to give 90 percent of the effective voting power even though they make up only 10 percent of the population."[125] Rather than protect these interests before an election by prefiguring districting, legislators ought to develop other solutions to the problem such as when states, as well as the federal government, provide certain interests in society some form of breaks such as the subsidies provided for farmers within rural areas to foster a strong agricultural economy.[126]

If the "rational" argument were to stand over a commitment to political equality, then the judiciary would find itself in a compromising position, especially over the protection of individual rights. Forced into a position where the judiciary would need to consider the merits of each plan, it would be best for the Supreme Court to remove itself from apportionment and districting plans. Consideration of each plan on a case by case

[125] John Hart Ely, *Democracy and Distrust,* 122.

[126] John Hart Ely, *Democracy and Distrust,* 121.

basis would violate the new ethos of judicial restraint the Supreme Court establishes in *Baker* by validating or rejecting the interests for which the states attempt to secure representation. To avoid this position, the Supreme Court would need to reject the justiciability of apportionment and districting plans. At the very least, the first option would may perpetuate the malapportionment, involve the judiciary further into apportionment, and allow the states to perpetuate the idea that civic participation does not matter for those who do not share the same interests as the state. Of course, the second option perpetuates the malapportionment throughout the country. In consideration of these options, political quality balances interests within the state, allows citizens to participate in government, and provides a judicially manageable standard that allows for protection but removes the judiciary from the process, reinforcing the ethos of judicial restraint.

The Supreme Court's rejection of the protection of interests argument does not mean that the state cannot protect its interests through elections. Instead, the Supreme Court's position is that it cannot prefigure elections to protect interests. Consequently, the state and state representatives must engage citizens in a debate about the state but that debate cannot eliminate the political equality of the citizen. Each state can still be a "laboratory for democracy,"[127] but instead of providing rural areas with a majority of the

[127] "Laboratories of Democracy" is a term Justice Brandies employed in *New State Ice Co.* v. *Liebman*, 285 U.S. 311 (1932) to support democratic experiment in the states.

political power, the state may only provide funding to rural areas if the people choose to do so and the people cannot prevent other citizens from securing their political rights.[128]

As a result of the Reapportionment Decisions, the Supreme Court the Supreme Court recharacterized the relationships of the state governments to its citizens and the state governments to the federal government. In both cases, the Supreme Court diminished the power of the state to favor the power of the individual or the power of the national government. As the Supreme Court enacted political equality universally, the Supreme Court diminished the power of the state to use its discretionary power to protect its interest. While the dissenters of the Revolution claimed that federalism suffered, the Court's decisions created a public space that privileged all voices within the state to determined policy for the state. Instead of allowing states to discover solutions to its own problems before reaching consensus with all citizens, the Supreme Court stated that equality is prior to rationality, or, before the state can determine its desired preferences, it must allow citizens to partake in the process of representation.

Conclusion: The Degree of Equality

With the institutionalization of political equality through the reapportionment decisions, the Supreme Court needed to decide how equal "equal representation" would be. In *Kirkpatrick* v. *Priesler,* 394 U.S. 526 (1969) and *Wells* v. *Rockefeller*, 394 U.S. 542, (1969), the Supreme Court ruled that for Congressional Reapportionment, equal representation would mean that the states would need to make a "good faith effort" to

[128] *Lucas v. Colorado General Assembly*, 377 U.S. 713, 737 (1964).

achieve mathematical equality and there would be no *de minimis* standard to satisfy the "as nearly practicable" portion of "One Person, One Vote."[129] In *Wesbery* and *Reynolds*, the Court established the "One Person, One Vote" standard but left room for the States with "as nearly practical" exception, knowing full well that mathematical certainty was not obtainable but, also, if the Court were to articulate a *de minimis* standard, then legislative motive would be to push further away from equality to protect interests.[130] For the Supreme Court, the presence of deviation implies the presence of discrimination, especially if the state legislators did not choose the plan with fewer deviations or disregards the maxim of political equality. If the states legislators created districts with variations, then they possessed the burden of proof to show why the variations would be allowable under the "One Person, One Vote," principle. While the states legislatures of Missouri and New York relied on the perceived invention of an imminent *de minimis* standard, as well as defending the interplay of partisan forces within the political process and the protection of interests that would disappear under "One Person, One Vote," the Supreme

[129] In *Swann* v. *Adams*, 385 U.S. 440, 450, (1966), The Supreme Court stated that there could be variations or a de minimis amount; however, the Supreme Court failed to discuss that standard because the motives of the legislature would be to aim for the standard and not for the ideal. Further, there would be no uniform standard as a decision would need to fully discern the considerations of the apportionment plan and the state. The Court discussed this position in *Wesberry* and *Reynolds* as well.

[130] The best representation of the conservative approach develops from *Roman* v. *Sincock*, 377 U.S. 695, 710 (1964), where Chief Justice Warren states that the decision in *Reynolds* did not mean that the states needed to, "state in mathematical language the constitutionally permissible bounds of discretion in deviating from apportionment according to population. In our view the problem does not lend itself to any such uniform formula, and it is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme under the Equal Protection Clause. Rather, the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur is recognizing certain factors that are free from any taint of arbitrariness or discrimination."

Court rejected those arguments to protect equality.[131] In both cases, the Supreme Court prioritized political equality to create political fairness and would not let the state legislature trump that right without providing good reasons to do so.

The dissenting justices in *Kirkpatrick* and *Wells* further despised the ways in which the Supreme Court's decisions diminished the power of the legislature to engage the political process. Justice Harlan, who acquiesced to the majority on reapportionment in the 1966 case *Burns* v. *Richardson*, pronounced that the majority's "Draconian judgments" transformed, "a political slogan into a constitutional absolute. Strait indeed is the path of the righteous legislator. Slide rule in hand, he must avoid all thought of county lines, local traditions, politics, history, and economics, so as to achieve the magic formula: one man, one vote."[132] The religiosity of equality, for Justice Harlan, weakened the political process. Because the census itself may be inexact, due to problems of conducting the census, a mobile population, and large group of ineligible voters, Justice Harlan condemned the Court for its desire to impose exactness and for the distrust of the legislative process.[133]

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[131] In *Kirkpatrick* v. *Preisler*, 394 U.S. 526, (1969), Missouri possessed districts that differed from the ideal, from 2.84% below and 3.13% above the ideal for the state. While the state legislature was presented with other plans with smaller variances, the state legislature refused to adopt those to preserve the protection of interests. In *Wells* v. *Rockefeller*, 394 U.S. 542, (1969), New York required 41 Congressional districts. Of those districts, 31 met the "One Person, One Vote," Requirement, while the remaining ten counties contained some variation (+6.488% and -6.6.8% below the mean population for a district). Because of the variations, the Supreme Court ruled that the districts violated the command of equal population from Article I, 2.

[132] *Wells* v. *Rockefeller*, 394 U.S. 542, 549 – 550, (1969).

[133] *Wells* v. *Rockefeller*, 394 U.S. 550, 551 (1969).

In *Wells,* Justice Byron White noted that the Supreme Court's decision in Reynolds requiring political equality would not prevent gerrymandering as it is impossible, especially for the Supreme Court, to remove the political, economic, regional, and historical considerations.[134] Noting the absurdity of trying to create equal districts in order to prevent the court from implementing equality, he writes, if legislators ignore traditional political boundaries to favor equality, then a cartographers can rely on a computer to, "produce countless plans for absolute population equality, one differing very little from another, but each having its own very different political ramifications. Ultimately, the courts may be asked to decide whether some families in an apartment house should vote in one district and some in another, if that would come closer to the standard of apparent equality."[135] Consequently, the articulation and institutionalization of political equality does not mean the articulation or institutionalization of political fairness. According to Justice Harlan in *Wells*, the rule of absolute equality is "perfectly compatible with 'gerrymandering' of the worst sort. A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues.[136] In time, the Supreme Court would back away from the stern pronouncement of political equality.

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[134] In *Wells* v. *Rockefeller,* the plaintiff characterized the apportionment plan as a partisan gerrymander but the Supreme Court did not rule on the merits of this claim. Justice White's attack here alludes to Chief Justice Earl Warren's claim in *Reynolds* v. *Sims*: "Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." See *Wells* v. *Rockefeller*, 394 U.S. 550, 544 (1969) and *Reynolds* v. *Sims*, 377 U.S. 533, 579 (1964).

[135] *Wells* v. *Rockefeller*, 394 U.S. 542, 556 (1969).

[136] *Wells* v. *Rockefeller*, 394 U.S. 542, 551 (1969).

These opinions from the Court would prophesize the challenges facing the Supreme Court over the next two decades. For the dissenters, since the foundation of apportionment is equality, the Supreme Court pursues jurisprudence that will be impractical, impossible and undesirable; consequently, the Court should allow the state legislatures to ability to determine the political realities of the state even if the citizens do not possess the ability to petition the legislature for a change through the political or judicial institutions. Consequently, state rationality enthrones political inequality and diminishes the potential for political participation but it would prevent the judiciary from determining the nature of representation inherent in the complexity of the political process. Even if the judiciary were to allow the state to adhere to traditional lines or follow traditional boarders (i.e. prevent the judiciary from checking the power of the state or to prevent the judiciary from discerning discrimination through boundaries), then the court may prevent the egregious cases of gerrymandering or malapportionment though some citizens would still be excluded from civil society.

For the majority in the Reapportionment Revolution, any unnecessary or unjustified deviation from equality represents discrimination against the citizen. If there were a deviation at any level, then the apportionment plan threatens the civil liberties at that level. Further, any deviation from equality at the expense of interests allows for the state legislature to create any "rational" plan for reapportionment. According to the majority in the Reapportionment Revolution, the state needs to be characterized by its neutrality rather than its partisanship. Further, the political institutions need to provide a

space that all citizens can access and determine the important interests of the state. In this reading of the Reapportionment Revolution, the extension of the "One Person, One Vote" rule constitutes the creation of a meaningful public sphere. Rationality can exist under this plan, but equality must precede it to ensure all citizens can access the public sphere and that all citizens can benefit from the division of governmental resources.

Yet, missing from this account of the public sphere is to what extent political groups can exert influence over one another and the state. According to Alexander Keyssar, the Supreme Court's decision in *Allen* concerns the lack of representation for minority communities and their community interests, which would become the focus of vote dilution cases.[137] On its face, the language of *Baker*, *Wesberry*, *Reynolds* and the subsequent cases refer to the right of the individual. By the end of the decade, the language of the Reapportionment Revolution itself would need modification to cover the protection of the community and a right to vote that discusses fairness for those communities especially as state legislators found new ways to threaten the development of representation under the ideology of political equality.

[137] Alexander Keyssar, *The Right to Vote,* 300.

CHAPTER V

RACE, PARTISAN POLITICS, AND REDISTRICTING: THE RHETORIC OF POLITICAL FAIRNESS

> Our fathers believed that if this noble view of the rights of man was to flourish, it must be rooted in democracy. The most basic right of all was the right to choose your own leaders. The history of this country, in large measure, is the history of the expansion of that right to all of our people.
> Many of the issues of civil rights are very complex and most difficult. But about this there can and should be no argument. Every American citizen must have an equal right to vote. There is no reason which can excuse the denial of that right. There is no duty which weighs more heavily on us than the duty we have to ensure that right. Yet the harsh fact is that in many places in this country men and women are kept from voting simply because they are Negroes.[1] President Lyndon B. Johnson

> When I vote my equality falls into the box with my ballot— they disappear together.[2] Louis Veuillot

On March 15th, 1965, President Lyndon B. Johnson addressed Congress and the American people in support of the Voting Rights Act, the purpose of which was to weaken the structure of racial discrimination throughout the United States. In this address, President Johnson offered a legislative solution to combat racial discrimination contained in voting regulations and perpetuated by "every device of human ingenuity." As Garth E. Pauley writes, President Johnson located the VRA within the context of the American Promise and that support for the act is a way for Americans to fulfill the

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[1] Lyndon B. Johnson, "The American Promise," In Garth E. Pauley, *LBJ's American Promise: The 1965 Voting Rights Address*, (College Station: Texas A&M University Press, 2007), 3.

[2] Louis Veuillot quoted in Benjamin Barber R. Barber, *Strong Democracy: Participatory Politics for a New Age*, (Berkeley: University of California Press, 2003). 146.

purpose of the Nation. According to Pauley, the president asked his audience to see themselves as a chosen people, "endeavoring to sustain democratic governance in order to live out their covenant," and engaged in a mythic and quasi-religious quest and not just a political quest.[3] Opponents of the VRA, Pauley writes, would be considered un-American, as voter discrimination would be inconsistent with American democracy.[4] Yet, while support for the bill was overwhelming in the House and the Senate, it did not receive full support throughout the states.

In January of 1966, the Supreme Court heard oral arguments in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), that challenged the constitutionality of the bill. Soon after the enactment of the VRA, South Carolina challenged the constitutionality of the VRA on the grounds that the act exceeded the authority of Congress and encroached on the authority of the states to create electoral requirements.[5] Arguing on behalf of South Carolina, David W. Robinson II stated that plaintiffs did not challenge the purpose of the act or a majority of provisions of the act; however, the South Carolina challenged portions of the VRA that required the automatic suspension of literacy tests, froze the legislative process, and created criminal sanctions against states. [6] In creating the act, the plaintiffs argued that Congress exceeded its constitutional and historical authority to create

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[3] Garthe E. Pauley, *LBJ's America Promise,* 108.

[4] Garthe E. Pauley, *LBJ's America Promise,* 106.

[5] *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323 (1966).

[6] Transcript of Oral Argument *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1965). Available at http://www.oyez.org/cases/1960-1969/1965/1965_22_orig/argument-1/.

electoral requirements for the state; the coverage formula violated the "principle of equality of the States;" the act denied due process as it altered presumption and constituted states covered as guilty; prevented judicial review of administrative findings; impaired the separation of powers by "adjudicating guilt through legislation;" and constituted a bill of attainder against the states.[7] In deciding the case, the decision by Chief Justice Warren dismissed the due process, the Bill of Attainder, and separation of power arguments as they relate to persons and private groups and not states.[8] In defining the case, The Chief Justice asked whether or not Congress "exercised its power under the Fifteenth Amendment in an appropriate manner with relation to the States."[9]

The Supreme Court's decision in *South Carolina* v. *Katzenbach* reveals the dangers of democratic politics, especially concerning irrational forms of majortarian rule and the depth of racial animosity preventing individuals from fulfilling political equality. The Act stands as the culmination of the Supreme Court's jurisprudence on the Fifteenth Amendment and seeks to eliminate all of the tests and devices to prevent citizens from participating in the electoral process. Speaking for an 8 - 1 majority, Chief Justice Earl Warren states "the Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting."[10] The legislative history reveals that, "Congress

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[7] *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323 (1966).

[8] *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966).

[9] *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966).

[10] *South Carolina* v. *Katzenbach*, 383 U.S. 301, 315 (1966).

felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution," concluding that, "the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment."[11] Though severe, the act's purpose, according to Chief Justice Warren, concerns the ability of the Attorney General, the Department of Justice, and the Federal Judiciary to "combat widespread and persistent discrimination in voting,"[12] in hopes that millions of racial minorities to, "to participate for the first time on an equal basis in the government under which they live."[13]

Justice Hugo Black offered the lone dissent in the case. In his opinion, Justice Hugo Black attacked the VRA for the way in which it decimated principles of federalism and denied state sovereignty, treating the states like "conquered territories," and forcing the states to "beg federal authorities to approve of its policies" before it could pass state laws.[14] As the Constitutional ratification debates show, Congress never possessed the authority to "veto or negative state laws" and the power of the judiciary to invalidate a state long after the law passed in a "long way away from the power to prevent a State from

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[11] *South Carolina* v. *Katzenbach*, 383 U.S. 301, 310 (1966).

[12] *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966).

[13] *South Carolina* v. *Katzenbach*, 383 U.S. 301, 337 (1966).

[14] *South Carolina* v. *Katzenbach*, 383 U.S. 301, 358 - 360 (1966); see also the dissent by Chief Justice Burger, Justice Stevens and Justice Rehnquist in *United States* v. *Sheffield Board of Comm'rs*, 435 U.S. 110, 141 (1978). In the later decision, the three justices use the destruction of state power argument as a way to narrow the Supreme Court's reading and limit the interpretation of the VRA to include only states and counties and not cities.

passing a law. I cannot agree with the Court that Congress— denied a power in itself to veto a state law— can delegate this same power to the Attorney General or the District Court for the District of Columbia"[15] While Justice Black acknowledges that the VRA allows for Congress to suspend literacy tests, he could not support the threat to state sovereignty though some states themselves denied the sovereignty of its citizens.

The Supreme Court's decision in *South Carolina* v. *Katzenbach* represents the beginning of a new era of voting rights cases concerning representation and race relation, partisan politics and government relations. Keith J. Bybee writes that the language of Chief Justice Earl Warren's decision focuses on the deliberations of Congress, arguing that Warren frames his discussion by focusing on Congressional learning. Bybee writes that, Warren's opinion concerns the "language of discovery and edification," revealing that Congress "learned" the extent of discrimination and "knew" the discrimination must end.[16] By adopting this language, the Chief Justice could provide a broad and aggressive remedy to fight the next new device that would deprive racial minorities the right to vote and participate in the political process. By using Congress as a model, even for the controversial section of preclearance, Justice Warren provides the country with an example of fair deliberation and fair political opportunities, showing the States that if the followed the model exemplified in Congress' use of inclusive hearings, gathering and examining enormous amounts of data, holding lengthy debates, and providing reasonable

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[15] *South Carolina* v. *Katzenbach*, 383 U.S. 301, 361 (1966).

[16] Keith J. Bybee, *Mistaken Identity: The Supreme Court and the Politics of Minority Representation,* (Princeton: Princeton University Press, 1998), 84.

measures to repair political communities, there would not be problems with the acceptance of the VRA.[17]Of course, as the Supreme Court's decision in the 1970s and 1980s suggest, state government chose not to accept the Chief Justice's call for deliberation, choosing to develop representation according to their interests and not the interests of their citizens. This chapter examines the competing visions of representation and democracy that constitutes the democratic experience in the Supreme Court's reapportionment and redistricting decisions after Chief Justice Earl Warren stepped down from the Supreme Court. During the reapportionment and redistricting decisions in 1970s and the 1980s, the Supreme Court attempts to define the nature of representation and democracy. Because the ideology of political equality is malleable with territorial districting, the ideological debate during the 1970s and the 1980s concerns the ideology of political fairness in the reapportionment and districting process. Beneath the ideology of political fairness, the Supreme engage in a debate to establish interpretive dominance over which vision of representation, which vision of the judiciary, and which vision of democracy should form the basis for the representative anecdote of American democracy.[18] Through these decisions, I argue that the Conservative Justices define representation as an act of authorization and define political fairness in terms of the ability of state legislators to conduct representation. These two definitional arguments constitute voting as an individual right that privileges the state legislators. Consequently,

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[17] Keith J. Bybee, *Mistaken Identity,* 85.

[18] For a discussion of interpretive dominance see Mary E. Stuckey and Frederick J. Antczak, "The Battle of Issues and Images: Establishing Interpretive Dominance," *Communication Quarterly* 42.2 (1994): 120 – 132.

the Conservatives Justices envisions a political process that protects a majoritarian conception of democracy and an elite conception of democracy that requires little deliberation by the people. Conversely, the Liberal Justices on the Court attempt to replace the ideology of political equality with of political fairness, where representatives act for a group. Accordingly, the Liberal Justices argue for a conception of democracy that protects the ability of groups to compete within the democratic process and the judiciary acts to protect that rights. By the end of the 1980s, the Liberals Justices would claim a tentative victory in interpretive dominance though it would be a short-lived victory because of ideological alterations to the Supreme Court.

Exigence of Reapportionment and Redistricting in the 1970s and 1980s

Judicial Transitions: The End of the Warren Court

In the beginning of the 1970s, state legislators initiated the first attempt of redistricting in light of the standards created by the Supreme Court through the Reapportionment Revolution as well as the Congressional standards from the Voting Rights Act. With the next round of reapportionment, in increase in litigations occurred throughout the state and federal courts as political parties and political interests judiciously selected jurisdictions to ensure victory for their cause. However, while there was in increase of litigation in the lower levels of the judiciary during the 1970s, the Supreme Court heard oral arguments in nearly the same number of cases as it did in the 1960s. In the 1980s, the Supreme Court heard arguments in only a third of the cases that it did in the 1970s. Further, during the 1970s and 1980s, the Supreme Court did not

enact revolutionary reforms that reshaped the electoral process as it did during the 1960s. With the standard of political equality in place as the guiding principle for reapportionment and the resignation of Chief Justice Earl Warren as the most vocal advocate for that political equality, the Supreme Court refrained from enacting wide-spread reform in the political process, allowing for its 1960s decisions to settle in the states and providing Congress the opportunity to develop standards for representation, especially in regards to the Voting Rights Act.

One of the reasons why the Court did not establish revolutionary reforms concerns the constitution of the Court itself. In June of 1968, Chief Justice Earl Warren presented President Johnson with two letters, both of which discussed his resignation from the Supreme Court. This first letter by the Chief Justice, which consisted of only one sentence, stated he would resign at the pleasure of the president; the second letter presented a more detailed account for his retirement, his age and views of democracy: "When I entered the public service, 150 million of our 200 million people were not yet born. I, therefore, conceive it to be my duty to give way to someone who will have more years ahead of him to cope with the problems which will come to the Court."[19] By presenting his resignation letters to President Lyndon Johnson, Warren attempted to avoid what happened next—the possibility that Richard Nixon would appoint the next Chief Justice of the Supreme Court. Though he possessed the opportunity to appoint a new Chief Justice, a political miscalculation by the President to promote his friend and

[19] Jim Newton, *Justice for All: Earl Warren and the Nation He Made*, (New York: Riverhead Books, 2006), 491.

confidant Abe Fortas resulted in Nixon's opportunity to nominate a Chief Justice and an Associate Justice.[20] It would not be until 1993 until a Democratic President would nominate a Supreme Court Justice.

During the 1970s and the 1980s, Republican Presidents Nixon, Ford, and Reagan appointed eight justices to the Supreme Court. In making their appointments, Nixon and Reagan declared that, like Eisenhower, they would appoint conservative justices who were not "liberal" or "activists."[21] This time though the Republican presidents were more successful with their judicial appointments following conservative principles. In 1969, Nixon nominated Warren Burger to replace Chief Justice Warren. After his strategy of nominating Southern Justices,[22] who opposed the Civil Rights movement, failed to replace Justice Fortas, in June of 1971 President Nixon filled the vacancy with Henry Blackmun, a Justice that, while on the Court, voted in the majority, regardless of ideology, for each the reapportionment and redistricting issue. On September 17, 1971— six days before his death—Justice Hugo Black submitted his resignation to President Nixon. On September 23, 1971, Justice John Marshall Harlan submitted his resignation. With two additional

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[20] The Senate rejected the nomination of Fortas. Soon after his failed confirmation, Justice Fortas resigned the High Court as an investigation revealed the Justice received a $20,000 fee from Louis Wolfson, who was the target of an investigation by the Securities and Exchange Committee and bragged that Justice Fortas would use his influence to help me. See Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court*, (New York: Simon and Schuster, 1979), 5 – 15.

[21] Lawrence M. Friedman, *American Law in the 20th Century*, (New Haven: Yale University Press, 2002), 524 – 525.

[22] Trevor Parry-Giles, *The character of Justice: Rhetoric, Law, and Politics in the Supreme Court Nomination Process*, (Lansing: Michigan State University Press, 2006), 88. Parry-Giles argues that the Senate rejection of Clement F. Haynesworth and G. Harold Carswell serves as an ideological sign of the law's commitment to Civil Rights.

vacancies, President Nixon nominated Louis F. Powell, a moderate Justice who voted with the other conservatives except in partisan gerrymandering cases, and William Rehnquist, a Justice who provided one anchor for the Conservative ideology on the Supreme Court. During his one term as President, Gerald Ford nominated John Paul Stevens to the Court, who started his tenure as a moderate-conservative but then drifted liberal, especially during the 1990s and 2000s. In the 1980s, President Ronald Reagan appointed another conservative anchor to the Court with his selection of Antonin Scalia and two moderate Justices, Sandra Day O'Connor and Anthony Kennedy, who provided the essential "swing-vote," directing the jurisprudence of the Court during the 1990s. Finally, upon Chief Justice Burger's retirement, Reagan nominated Justice Rehnquist claim the throne.

Under the *guidance* of Chief Justice Warren Burger, the direction of the Supreme Court was not always clear. With the numerous additions to the Court, and the number of Justices switching positions and ideology, the opinions did not create a coherent reapportionment and redistricting jurisprudence in a similar fashion to the Warren, or even Rehnquist, Court. While the Burger Court did not reverse the progressions of the Warren Court, it attempted to hold the line to prevent additional developments of the Rights Revolution. As Mark Tushnet points out, the phrase "this far and no further" describes the post-New Deal and Great Society constitutional order, especially in regards to the understanding of individual rights: "The overall effect is to create a constitutional order with a chastened vision of what the Constitution requires in connection with

individual rights, but no radical alternative to or general repudiation of the prior order's accomplishments."[23] Yet, in other ways, Tushnet's comments deflect away from the attempts of the Conservative Justices to eviscerate the law of the Warren Court through small, incremental changes.

For example, in the reapportionment decisions under Chief Justice Burger and Chief Justice Rehnquist, the Court followed the One Person, One Vote requirement and the establishment of political equality. [24] Yet, while upholding the political equality ideology of the Warren Court, the Conservative Courts eased some of the dictates of the Reapportionment Revolution and refused to grant new substantive rights in reapportionment. During this time, the Court ruled that local and state governments could deviate from equality to follow the integrity of political subdivisions to allow for flexibility to meet changing social needs;[25] supported the state legislature as the primary

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[23] Mark Tushnet, *The New Constitutional Order*, (Princeton: Princeton University Press, 2003), 67. Tushnet borrows the phrase "this far and no further" from James Fleming. See James Flemming, "Fidelity, Basic Liberties, and the Specter of Lochner," *William and Mary Law Review* 41 (1999): 152.

[24] *Hadley* v. *Junior College District of Metropolitan Kansas City*, 397 U.S. 50, 54 - 55 (1970). In a 5 – 4 decision by Justice Hugo Black, the Supreme Court declared, on the authority of *Avery* v. *Midland County*, that political equality must extend to a state or local government function that performs public functions, the Equal Protection Clause requires each voter to possess equal voice for the election. In *Ely* v. *Klah*, 403 U.S. 108 (1971), the Supreme Court issued a 9 – 0 opinion that state a district court did not err by providing the state legislators a reasonable amount of time to redistrict the state and that the district court is in the best position to know whether or not the state possesses enough time to redistrict before an election. In *White* v. *Weiser*, 412 U.S. 783 (1973), the Supreme Court issued a 9 – 0 decision that struck down Congressional districts in Texas as the State Legislators failed to make a good faith effort to eliminate deviations in population in order to protect political subdivisions as those deviations were not unavoidable. The Supreme Court decided *White v. Weiser* on the same day as *White* v. *Regester* and *Gaffney*.

[25] *Abate* v. *Mundt*, 403 U.S. 182, 185 (1971).

authority in redistricting;[26] required that state legislators need a chance to determine the question of its law before the district court or the Supreme Court determines the federal constitutional issue over reapportionment;[27] stated population deviations are permissible in a state's reapportionment plan, more so than a Congressional plan, if the state follows a rational state policy;[28] noted that equal population standards for state reapportionments are not as strict as they are for Congressional standards, allowing for deviations up to 10% without judicial scrutiny absent from other racial or political considerations;[29] and, in a narrow decision tailored to one state, ruled that a Wyoming county, with a population of only 2,294— an 23% deviation from the ideal— could possess one representative because since its inception as a state Wyoming consistently used the county boundary as a criteria to create districts and apportion representatives in the state legislature.[30] By easing the restrictions, the Supreme Court upheld the basic provisions of the Warren Court but provided the states with greater flexibility to enact reapportionment and redistricting plans, allowing for an interjection of federalism into reapportionment and the desire to consider practical measures of each state rather than subjecting state legislators to an abstract ideal of political equality.

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[26] *Minnesota State Senate* v. *Beens*, 406 U.S. 187, 196 - 198 (1972).

[27] *Harris County Commissioners* v. *Moore*, 420 U.S. 77, 88 (1975).

[28] *Mahan* v. *Howell*, 410 U.S. 315, 320 – 328, (1973).

[29] *White* v. *Regester*, 412 U.S. 755, 762 - 765 (1973); *Gaffney* v. *Cummings* 412 US. 722 (1973).

[30] *Brown* v. *Thompson*, 462 U.S. 835 (1983).

While the Supreme Court no longer enacted widespread reform to the electoral process, it began to uncover the hidden reality of the reapportionment decisions. As the Supreme Court framed its decision within the language of electoral proceduralism to promote political equality, voters challenged the substance of the Court's decisions, especially as to how representation affects individuals and groups within states and their political subdivisions. Further, one of the most important aspects of *Baker* and other reapportionment decisions the Supreme Court refrained from explicit discussion within the text was which groups of citizens received diminished voting because of the reapportionment plans. While the decision reinforces dialectics between rural and urban, conservative and liberal, and to an extent rich and the poor, the justices rarely discussed the racial aspect of reapportionment, especially with regards to how reapportionments allowed white rural voters to possess more political power than black urban voters,[31] hiding the reality that "unresponsiveness" translated into "exclusion."[32] For example, in pre-*Bake* Tennessee, the lack of reapportionment by the state legislature presented minorities with another poll tax, another literacy test, and another "good-character" test that prevented racial minorities effective and fair representation. Accordingly, *Baker* becomes symbolically important as a victory in the long struggle for Civil Rights, in some ways as important as the Freedom Rides and the protests in Selma, and the passing of the Civil Rights Act and the Voting Rights Act. By the end of the 1960s and the beginning of

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[31] Jim Newton, *Justice for All: Earl Warren and the Nation He Made*, (New York: Riverhead Books, 2006) 388.

[32] Lani Guinier, "The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Representation," *Michigan Law Review* 89 (1991): 1095.

the 1970s, the Supreme Court, as well as the other coordinate branches of government, needed to address how electoral districts altered the representation of minorities within the states.

In addition to the development of a jurisprudence centered on the VRA, the Supreme Court began to focus on the partisan nature of apportionment and gerrymandering cases. During the 1970s and 1980s, the Supreme Court heard oral arguments in five cases that discuss the partisan implications of reapportionment and redistricting plans.[33] In *Baker*, the state Democrats frustrated the will of the state Republicans and those that would vote for Republicans; however, this was outside of the scope of the Court's decision. According to Mark Tushnet, *Baker* initiated a period of ideological driven districts where candidates face tougher challenges in their party than against the other party.[34] Consequently, political parties searched for ways to ensure victory at the expense of competitive elections and at the expense of the other party. Partisan redistricting culminated in the Supreme Court's 1987 decision, *Davis* v. *Bandemer,* 478 U.S. 109, where the Court ruled that partisan redistricting challengers were justiciable. Yet, even though they were justiciable, partisan gerrymandering claims never received the same sympathy by the Supreme Court as racial gerrymander claims because of

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[33] The five cases are *Ely* v. *Klahr*, 403 U.S. 108 (1971), *Gaffney v. Cummings*, 412 U.S. 772, *White* v. *Weiser*, 412 U.S. 783 (1973), *Karcher* v. *Daggett*, 462 U.S. 725 (1983), and *Davis* v. *Bandemer*, 478 U.S. 109 (1986). The decision for *Gaffney* v. *Cummings* (Connecticut State Legislative Reapportionment) and *White* v. *Weiser* (Texas Congressional Reapportionment) were handed down on June 18th, 1973, the same day the Supreme Court handed down *White* v. *Regester*, 412 U.S. 755 (1973 (Texas State Legislative Reapportionment), which protected minority voting blocs in Texas and allowed for a 10% population deviation standard for state legislative apportionment.

[34] Mark Tushnet, *The New Constitutional Order*, 15.

the Voting Rights Act and a plurality of the Supreme Court would rule in *Vieth* v. *Jubelirer*, 541 U.S. 267 (2004) that political gerrymandering claims were not justiciable.

Congressional Action: The 1965 Voting Rights Act and the Guilt of Racial Vote Dilution

Though the Supreme Court refused to expand the rights of citizens, it upheld the expansion of rights through Congressional action. When Congress enacted and the President signed the 1965 Voting Rights Act (VRA) into law, they initiated the most comprehensive electoral reform act and the largest possible rebuke to state governments, especially in relation to the subordination of the state governments to the federal government. While President Johnson presented the bill in the language of hope and redemption, the bill itself arrived in the language of guilt and sin. No longer would Congress accept excuses as to why some members of the community lacked the right to vote or the right to cast a meaningful ballot almost one hundred years after the ratification of the fifteenth amendment. The VRA not only protects the ability of a citizen to case a meaningful ballot by prohibiting the states from enacting procedures to diminish the worth of a vote, it would eventually ensure the representation of constituents through the selection of the "candidate of choice."

Though harsh, the text of the VRA presents a means to redemption, but only by accepting a stigma of discrimination through a strategy of mortification. The toughest provision on the offending states is that of the Pre-Clearance portion of Section 5. During deliberation on the VRA, Congress thought that the was necessary because states

implemented new prohibitions of voting as soon as a prior ban was held unconstitutional, resulting in the dilution of the right to vote without any form of judicial remedy.[35] The presence of these tests and the absence of voter registration and turnout serve as a powerful sign of voter discrimination in the areas under coverage of the VRA. Rhetorically, the stigma of the VA upon the states and the covered areas serves as a means to persuade those covered areas to adopt a position of mortification about racial discrimination. The stigma of the VRA, especially the Pre-Clearance of Section 5, serves as a legal representation of discrimination past, Hawthorne's *Scarlet A*. As a corrective move, it asks legislatures to identify no longer with the past efforts of discrimination but to adopt a strategy of mortification by admitting its guilt, moving forward, and allowing its citizens to gain access to the political process. Accordingly, because of the high level of discrimination, new areas would be included and the meaning of political of political subdivision would extend to any governmental entity "having power over any aspect of the electoral process within designated jurisdictions."[36]

The provisions of the VRA call for the protection of both an individual's right to vote and a group's right to vote, especially for protected minorities who saw their vote diluted through electoral devices and redistricting. Section 2 of the act declares that "no voting qualification, prerequisite to voting, or standard practice or procedure," shall be

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[35] *South Carolina* v. *Katzenbach*, 383 U.S. 301, 355 (1966), Any political subdivision, a county or parish that registers citizens to vote, that employed a test or device to abridge the right to vote or that, according to the Director of the Census, less than 50% of its voting-age residents were registered, would be required to file its apportionment plan for review to the Attorney General of file for a hearing in the United States District Court for the District of Columbia (317).

[36] *United States* v. *Sheffield Board of Comm'rs*, 435 U.S. 110, (1978).

used by any political subdivision or state to deny the right to vote based on race or color.[37] Section 3 allows for judicial relief in legal controversies over the violation of the fifteenth amendment, the Attorney General the power to enforce guarantees of the fifteenth amendment and to suspend voting tests and devices that suspends the right to vote, and the judiciary to retain jurisdiction, if a violation were found, until the court determines that the "qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect o denying or abridging the right to vote on account of race or color."[38] Section 4 prohibits the use of any tests of devices the denies the right to vote and calls for the conveying of a three judge panel, with an appeal to the US Supreme Court, to determine a violation. Further, Section 4 requires that this rule will apply to a state or political subdivision which, according to the Attorney General, maintained voting tests on November of 1964, or whereby less than "50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less then 5- per centum of such persons voted in the residential election of 1964."[39] Section 4 also protects the rights of citizens to vote using ballots that are not in English.[40] Section 10 prohibits the use of poll taxes and provides the court with jurisdiction to hear cases involving poll taxes.

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[37]89 Public Law 110, 89th Cong., 1st Sess. (6 August 1965), *Voting Rights Act of 1965*, 437.

[38] 89. Public Law 110, 437-438

[39] 89. Public Law 110, 438.

[40] Other important aspects of the VRA, which do not concern redistricting or reapportionment include, Section 6 allows the court to appoint examiners to search for violations of Section 3 and to determine eligibility to vote. Section calls for examiners to investigate who is eligible to vote. Section 8 allows examiners to observe elections in states and political subdivisions. Section 9 concerns challenges to the examiner's prepared list of who can vote. Section 12 provides a penalty for any individual who would violate

Section 5, which originally was the most controversial aspect of the VRA, requires that if a state or political subdivision is found in violation of the VRA, then that state or political subdivision requires pre-clearance when it attempts to change any "voting qualification or prerequisite to voting, or standard practice, or procedure with respect to voting different from that in force on November 1st, 1964."[41] The state must submit its plan to the Attorney General or to the United States District Court for the District of Columbia for a declaratory judgment to determine that such "qualifications, prerequisite, standard, practice, or procedure does not have the purpose of will not have the effect of denying or abridging the right to vote on account of race or color."[42] Once submitted, the Attorney General possesses sixty days to render a judgment, though the Supreme Court ruled in that this does not mean that if the Attorney General does not respond in 60 days the plan is valid.[43] The controversy with this provision is that once an area is designated as a "specially targeted area," i.e. a place where violations occurred in the past, then in order to free itself from §5 requirements, the state, and not just a political subdivision within a

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sections 2, 3, 4, 5, 7, or 10. Section 13 presents conditions for the termination of listing, such as when all people listen on an examiner's report have been placed on voting rolls, when there is no longer reason to believe people will be denied the right to vote, when 50% of non-white inhabitants are registered to vote, and upon the authorization of the court.

[41] 89. Public Law 110, 439. Originally, the pre-clearance portion of VRA covered six Confederate States; however, currently, the pre-clearance section covers the entire states of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, Virginia (except eight counties); certain counties in California, Florida, New York, North Carolina, and South Dakota; and, finally, certain towns in Michigan and New Hampshire

[42] 89. Public Law 110, 439.

[43] *Allen* v. *State Board of Elections*, 393 U.S. 544, (1969).

state, possesses the burden of proof to show that it does not discriminate voting practices or procedures.[44]

Though the Supreme Court followed the mandates set by Congress, the Warren Court, the Burger Court, and the Rehnquist Court provided competing interpretations over the scope of the VRA, especially in relation to §5. While this provision of the VRA may have been designed to cover voter registration and balloting, the Supreme Courts reading of the provision covers reapportionment and redistricting, causing a switch from concern over protected minorities from registering to vote to a concern over the meaning and utility over that vote.[45] In *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), the first and only case to involve the VRA and apportionment under the Warren Court, Chief Justice Earl Warren argues that the Court must reject, because of Congressional intent, a narrow reading of the Act as it "was aimed at the subtle, as well as obvious, state regulations which have the effect of denying citizens the right to vote because of their race," and that the "right to vote" includes "all action necessary to make a vote effective."[46]

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[44] *City of Rome* v. *United States*, 446 U.S. 156, 162 - 169 (1980).

[45] Richard K. Scher, Jon L. Mills, and Johns J. Hotaling, *Voting Rights & Democracy: The Law and Politics of Redistricting*, (Chicago: Nelson-Hall Publishers, 1997), 49.

[46] *Allen* v. *State Board of Elections*, 393 U.S. 544, 565 - 566 (1969). Allen includes four cases, three from Mississippi (cases 25, 26, & 36) and one from Virginia (case 30). Case 25 involves a change from district election to at large elections. No. 26 involves making an important county official an appointed rather than elective office. No. 36 concerns making it more difficult for an independent candidate to gain access on the ballot. No. 3 involves new procedures for write in candidates. All of these, the Court rules, constitute changes to voting qualifications or prerequisites to voting, or standard, practices or procedures with respect to voting under §5. In his Opinion, Chief Justice Warren states that these changes need to be considered under the VRA, as well as stating that individuals, and not just the Attorney General, can challenge changes to voting practices and procedures under §5 (557); citizens can bring forth complaints in local district courts rather than just the District Court for the District of Columbia to seek a declaratory judgment as to whether or not a new districting plan or change in procedures violates §5 (563); the State enacting change must

This broad reading would cover all state laws in regards to voting practices and procedures, from districting to voter registration to counting ballots. Under the Burger Court, the Supreme Court would adopt a more conservative and narrow reading of the VRA, determining that the criteria to judge §5 would be if the plan is non-retrogression in effect whereby protected minorities could not lose their influence in representation and state reapportionment and redistricting would need to preserve that representation.[47] This counters the broader reading of the VRA since it only minimally protects racial minorities and allows for the protection of redistricting plans that maintain the status quo rather than expand the political equality for groups. Under the Rehnquist Court, the Conservative Justices employed a strict test that required challengers to prove that State Legislators intended to discriminate against voters rather than show that the consequences of a plan, or disproportionate effects, discriminated against or diluted the votes of citizens.[48] In response to this decision, Congress altered §2 of the VRA to protect racial minorities as cohesive political groups. In a 9 – 0 decision, the Supreme Court supported this interpretation in *Thornburg* v. *Gingles*.

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submit the changes to the Attorney General rather than just rely on the fact the Attorney General may be "aware" that a state is making changes (571); and the States must resubmit plans and can receive bail-out from the VRA when the state they obtain a declaratory judgment that they have not used "tests or devices" proscribed by §4 (572).

[47] *Beer* v. *United States*, 425 U.S. 130, 141 (1976). In the next chapter, I will discuss how the non-retrogression and later interpretations of §5 and the vote dilution standard from the 1982 changes and the Supreme Court's decision in *Thornburg* v. *Gingles* will stand as a contradiction in jurisprudence.

[48] *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980). The City of Mobile employed at-large elections for its three city commission officers. Challengers attacked than plan stating that the at-large system prevented minority citizens the ability to elect candidates of their choice because the city employed at-large rather the district voting schemes and this constituted a vote dilution claim under §2. In a 6 – 3 decision, the Supreme Court ruled that at-large did not violate the Equal Protection Clause and political groups do not have the right to claim representation independent of an individual's right to vote.

Politically, the authorization and reauthorization of the VRA requires a high level of coordination between the three branches of the federal government. Congressionally, there has been a high level of support for the act with its initial authorization of 1965 and its reauthorizations in 1970, 1975, 1982, and 2006 though some members of Congress express doubt and frustrations with the preclearance conditions of Section 5. Congressman Lynn Westmoreland (R-GA) spearheaded a group in 2006 to release Georgia and other communities from the pre-clearance requirement of Section 5 since Georgia, and other areas, saw an increase in representation and elected officials for the protected minority groups.[49] Further, Rep. Westmoreland's group claimed that the pre-clearance was unfair since it required citizens to view the relations between races and representation in the past rather than in the present and diminished the notion of progress with minority voting.

Presidentially, there has been some disagreement with certain aspects of the act, especially from President Reagan, President G.H. Bush, and President George W. Bush. Under the Reagan Administration, current Chief Justice John Roberts, who worked for the Reagan administration as a special assistant to the Attorney General, attacked provisions of the VRA, especially concerning the broad language of the Act and what he considered a move to "racial quotas" for representation and the development of proportional representation, both of which he argued would be inconsistent with the

[49] Bob Deans, "Voting Rights Act Extended," *The Atlanta Journal-Constitution,* 28 July 2006 3C.

democratic principles of the United States.[50] President Reagan believed that a move from discovering discrimination by effects instead of intent would lead to proportional representation, which was, "alien to the traditional principles of our country," and, consequently, he preferred to extend the VRA with exceptions.[51] Though he asked President Reagan to commit to supporting the Voting Rights Act, President George H.W. Bush was not known for his commitment for protecting Civil Rights and opposed quota systems for representation, which some conservatives believe the VRA promotes.[52] President George W. Bush, like his Republican predecessors, supported the VRA to a degree. As Governor of Texas, Bush opposed the pre-clearance portions and the Act itself in *Bush* v. *Vera* 517 U.S. 952 (1996). However, because of the widespread support for the VRA, the president could not veto the act.

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[50] Robin Toner and Jonathan D. Glater, "Roberts Helped to Shape 80s Civil Rights Debate," *The New York Times,* 4 August 2006 A14.

[51] Ronald Reagan, "Statement on Action by the Senate Judiciary Committee Concerning Extension of the Voting Rights Act May 1982 Public Papers of Ronald Reagan: http://www.reagan.utexas.edu/archives/speeches/1982/50382c.htm.

[52] Ruth Marcus, "What Does Bush Really Believe? Civil Rights Record Illustrates Shifts," *The Washington Post,* 18 August 1992 A1. According to the article, in the 1960s then Congressman Bush opposed the Civil Rights Act, though as president he appointed Clarence Thomas and signed a Civil Rights Bill. During his term as President, Bush signed A Civil Rights Bill that would allow individuals more protection to bring forth legal challenges, especially in regards to hiring practices. Opponents believed that this would create a quote system for businesses. See John Lewis, "Civil Rights Opponents Resort to Old Arguments," *St. Petersburg Times,* 24 April 1991 15A.

State Recalcitrant: Mississippi Burning

While the federal government seemed to coordinate their efforts to prevent vote dilution and any practice the diminished the rights of racial minorities to cast a meaningful ballot, not all state governments desired that change in their reapportionment plans. As the States worked to develop redistricting plan after the 1970 census and incorporate the new reapportionment and redistricting guidelines, such as the One Person, One Vote rule and the new requirements under the VRA, not all states complied with the new regulations. The worst state, or the state to consistently disregard the new legal standards, was Mississippi. Between 1969 and 1990, the Supreme Court issued ten decisions that concerned reapportionment, redistricting, or the VRA from cases that arose in Mississippi, eight of which related to the implementation of one apportionment.

In *Allen* v. *State Board of Elections*, the Supreme Court heard four cases, three of which were from Mississippi, which challenged whether or not changes in districts would be covered under the Section 5 of the VRA.[53] Allen represents two ways in which the state of Mississippi attempted to disregard racial minorities as well as the VRA. First, the state believed that when it made changes to districts, it did not need to inform the Attorney

[53] *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969). In the Mississippi cases, the District Court ruled that these changes did not meet the pre-clearance requirement. In addition to *Fairly* v. *Patterson*, the other cases were *Bunton* v. *Patterson* and *Whitley* v. *Williams*. In No. 26, *Bunton* v. *Patterson*, the state legislature amended the state code to provide that in eleven specified counties, the county superintendent of education would be appointed rather than elected here as before the change, the counties had an option of electing or appointing the member. In No. 36, Whitley v. Williams, the state legislature changed the requirements for independent candidates running in the general election so that, (1) no one who voted in the primary could run as an independent candidate; (2) the time to file a petition to run was moved to 60 days before a primary instead of 40 days before; (3) the numbers of signatures needed to run was increased; and, (4), a new provision required that each qualified elector who signed the independent qualifying petition must include his/her polling precinct and county, 551.

General even if those changed would negatively impact the ability of racial minorities to cast a meaningful ballot. In No. 25, *Fairly et al.* v. *Patterson, Attorney General of Mississippi*, the state legislature of Mississippi altered the state's requirement that the board of supervisors for each county would be elected at–large rather than through electoral districts. The change in form of election by the state legislature was preemptive as it sought to delay the first instance that a black citizen of Mississippi would take his or her seat on the county board of supervisors. [54] Because Mississippi could not longer prohibit the right to vote outright, the state needed to invent other ways to prevent the political equality of racial minorities. While a district election may result in a minority group winning a legislative seat to represent them, in an at-large election with racial-bloc voting, the political equality of an individual's ballot means that the dominant majority frustrates the will of a minority group. Second, attorneys for the state argued that the legislature did not need to make a formal submission of its changes to the Attorney General and that the Attorney General would be aware of the changes in Mississippi. Since, as Mississippi believed, the AG was "aware" of the changes and he did not object to the changes, then there were no problems under the VRA. The Supreme Court rejected these arguments and the state legislature's authoritative interpretation of reapportionment under the VRA.

In 1971, the Supreme Court issued a per curiam decision in *Connor* v. *Johnson*, 490 U.S. 690 (1971), the first of several cases that would concern the same apportionment

[54] Andrew Kull, *The Color Blind Constitution*, (Cambridge: Harvard University Press, 1992), 214.

plan.[55] The impetus of this case was *Connor* v. *Johnson*, 256 F. Supp. 962 (1966), in which the District Court invalidated the State Legislature's 1962 apportionment plan, leading the establishment of a court drawn plan for the 1967 elections that too was declared unconstitutional in *Connor* v. *Johnson*, 265 F. Supp. 492 (1967). In the 1971 decision, the Supreme Court decided that the District Court needed to create an apportionment plan that utilized Single Member-Districts for Hindis County, which the District Court declared it could not do because of "insurmountable difficulties."[56] In 1972, the Supreme Court decided *Connor* v. *Williams* 404 U.S. 549 (1972) and, in a Per Curiam opinion, objected to the disparity between the largest and smallest districts of 18.9% in the Mississippi Senate and 19.7% in the House from a District Court ordered plan but decided to wait for consideration as it did not know if the rule from *Preisler* and *Wells* should apply to state districts.[57] In 1975, the Supreme Court declared that two Mississippi

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[55] In *Conner* v. *Johnson*, 490 U.S. 690 (1971), a District Court invalidated a Mississippi reapportionment plan because of large variations among districts. Parties submitted new plans and then the District Court released its own plan, which contained both single-member districts and multi-member districts. The Court ruled that the districts court's plan should not be in place because of the multi-member districts and, in the process, created a new guideline that stated, "when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter," 692. Further, the Court ruled that there was ample time for the district court to create a new plan, featuring single-member districts, before elections, even though the deadline for candidates to file for the election was June 4t. The case was decided on June 3rd. The Supreme Court extended the deadline for filing to June 14th, which Chief Justice Burger, and Justices Black and Harlan disagreed with this decision because, first, the Supreme Court disrupted the plans of politicians, forcing them to plan and run for a district election rather than at large election, second, would cause confusion with candidates and voters because of the unknown district lines, and, third, because the Supreme Court supported the use of multi-member districts in the previous cases. 693.

[56] *Connor* v. *Coleman*, 425 U.S. 675, 676 (1976). Plans by the state legislature and the district court attempted to follow historical guidelines, the most important of which were county lines.

[57] *Connor* v. *Williams*, 404 U.S. 549, 551 - 552 (1972). Appellants wanted the Supreme Court to decide this case in light of Congressional standards that concern no de minimis standard. However, the Supreme Court

legislative enactments to reapportion the state needed pre-clearance under Section 5 before those laws could be effective.[58] Consequently, the state submitted a plan to the Attorney General and the Attorney General objected, leaving the district court to create a temporary plan until the state legislature could develop a permanent plan in February 1976. Of course, this did not occur, as the district court decided against the examination of plans presented by the legislature because of other cases that concerned reapportionment under review by the Supreme Court.[59] In *Connor* v. *Coleman*, 425 U.S. 675 (1976), the Supreme Court ruled that there was no reason to wait and the district court needed to complete the apportionment process because the state legislature refused to develop a constitutionally permissible plan.

By 1979, the issues before the Supreme Court had still not been resolved, calling into question the 1979 state elections. In 1977, the Supreme Court reached yet another decision about malapportionment by the state legislature and the district court in *Connor* v. *Finch*, 431 U.S. 407 (1977) and issued orders to the district court to draw a

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hesitated on this point. Further, the Supreme Court decided against another claim by the appellants, invalidating the 1971 elections.

[58] *Connor* v. *Waller*, 421 US 656 (1975). In *Waller* v. *Connor*, 396 F. Supp. 1308 (1975), Appellees claimed that the Mississippi State Apportionment plans, through the use of multi-member districts, violated the "One Person, One Vote" rule of Reynolds and minimized or canceled out black voting strength. The District Court ruled that just because a racial group did not receive representation does not mean that the legislature discriminates against a group. Further, the court stated that the legislature possesses no duty to draw laws to enhance the representation of "sizable" minority groups to "maximize" political advantage." Finally, the group in question failed to show how the use of multi-member districts creates racial or economic discrimination.

[59] At the time, the district court waited for decisions in *East Carroll Parish School Board* v. *Marshall*, 422 U.S. 105 (1975), *Beer* v. *United States*, 419 U.S. 822 (1974), *United Jewish Organizations of Williamsburg, Inc.* v *Carey*, 423 U.S. 946 (1975).

reapportionment map that featured deviations less than the 16.5% in the State Senate and 19.3% in the House as well as drawing legislative districts that would not dilute the voting strength of blacks in the state, unless the district court provided a reason as to why that could not be accomplished.[60] Further, the apportionment plan, whether legislative created or court ordered, should "allay suspicions and avoid the creation of concerns that might lead to new constitutional challenges," especially in relation to the dilution of the vote of blacks within the state.[61] The state legislature and district court failed to present constitutional plans, leading to the final decision in *Connor* v. *Coleman*, 440 U.S. 612 (1979), whereby the Supreme Court ordered the district court to create a constitutional plan without regard as to whether or not the state legislature would do so before the deadlines for the 1979 elections. Additionally, in 1977, the Supreme Court released a per curium decision in *US* v. *Board of Supervisors of Warren County Mississippi* 429 U.S. 642 (1977), which reversed a decision by a Mississippi District Court that erred since it decided the wrong issue it faced.[62]

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[60] *Connor* v. *Finch*, 431 U.S. 407, 414 - 426 (1977). In this decision, the Supreme Court reminded the district court that the district court plan needs to be held to higher standards and that deviations must be accompanied by persuasive justifications and that the court ordered plan needs to avoid multi-member districts. Further, the historical reliance by the state, both the legislature and the district court, to rely on county boundaries as district boundaries would not be permissible.

[61] *Connor* v. *Finch*, 431 U.S. 407, 425 (1977).

[62] *United States* v. *Board of Supervisors of Warren County Mississippi* 429 U.S. 642 (1977). In this case, the District Court should not have ruled as to whether or not there was a violation of §5 but whether or not the county should could be enjoined from holding elections under a plan that could had not been cleared under §5.

In 1971, the Supreme Court issued a per curiam decision in *Connor* v. *Johnson*, 490 U.S. 690 (1971), the first of five cases ruling an 1967 reapportionment plan unconstitutional.[63] The *Connor* cases represent the weakness of judicial persuasion and the problems of incommensurability. Even with the general acceptance of *Reynolds* and the VRA throughout the country, some state governments found ways to circumvent political equality and political fairness by creating reapportionment plans that did not meet the standards from *Reynolds* or the VRA. [64] According to the Court in *Connor* v. *Finch*, neither the legislative apportionment plan nor the court ordered planed followed the "neutral principles" of *Reynolds*. In fact, where the state could have created compact districts of equal population, the state chose to create bizarrely drawn districts of unequal population to preserve white majorities in the districts.[65] As Justice Thurgood Marshall argues, the district court's reliance on the state legislature's primacy in state reapportionment presented a "transparent attempt to avoid the unequivocal command of the Court," leaving the Supreme Court with no other solution than to issue a writ of madamus to the district court to ensure the correct reapportionment.[66] Between the state legislature and the district court, three sets of state elections occurred (1967, 1971, 1975) with population

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[63] The other Mississippi are *Conner* v. *Johnson*, 490 U.S. 690 (1971); *Connor* v. *Coleman*, 425 U.S. 675 (1976); *Connor* v. *Williams* 404 U.S. 549, (1972); *Connor* v. *Waller*, 421 US 656 (1975). *Connor* v. *Finch*, 431 U.S. 407, 414 - 426 (1977).

[64] According to *Chapman* v. *Meier*, 420 U.S. 1, 14 – 21 (1975), the Supreme Court ruled that state reapportionment was the primary responsibility of the state legislatures, meaning the district courts must defer if the state legislatures can accomplish its goal.

[65] *Connor* v. *Finch*, 431 U.S. 407, 423 - 425 (1977).

[66] *Connor* v. *Coleman*, 440 U.S. 612, 624 (1979).

deviances and with the dilution of the right to vote for blacks. Without any power to punish the state legislators and the district court, its reapportionment decisions developed into empty decrees. From these decisions, it appears of if the state waited for additional decisions for the Supreme Court in the hopes that the Court would make some decision that would allow Mississippi to avoid complying with *Reynolds* or the VRA. By refraining to adopt constitutionally valid reapportionment plans under the authority of *Wesberry*, *Reynolds* and the VRA, state legislators ensured that elections occurred and minorities were denied the right to vote for another election cycle.

Race, Partisan Politics and the Ideology of Political Fairness: The Failure of Political Equality

During the 1970s and the 1980s, the Supreme Court released decisions in 35 cases relating to the reapportionment, redistricting, and the Voting Rights Act. Of these 35 cases and not considering the eight cases concerning Mississippi already discussed, the Supreme Court heard arguments in four specific areas of reapportionment and redistricting law. First, five cases concern claims of vote dilution, culminating in the Supreme Court's decision of *Thornburg* v. *Gingles*, which upholds Congress alteration of the VRA in 1982 and protects the ability of racial minorities, acting as cohesive political communities, to elect candidates of choice.[67] Second, twelve cases concern the procedure

[67] Before Congress amended the VRA in 1982, challengers present claims of vote dilution under the Equal Protection Clause of the Fourteenth Amendment and the Supreme Court. The vote dilution cases are *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971); *Wise* v. *Lipscomb*, 437 U.S. 535 (1978); *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980); *Rodgers* v. *Lodge*, 458 US. 613 (1982); *Thornburg* v. *Gingles*, 478 U.S. 20 (1986).

or substance of preclearance claims under §5 of the VRA.[68] Third, twelve cases explicitly concern apportionment though some of these decisions implicitly discuss partisan gerrymandering.[69] Finally, in *Davis* v. *Bandemer*, 478 U.S. 109 (1986), the Supreme Court rules that partisan gerrymandering is justiciable.

As state legislators incorporated the ideology of political equality and the requirements of the Reapportionment Revolution into their apportionment and districting laws, citizens continued to challenge the apportionment and districting laws. Yet, the concerns of citizens and the subsequent opinions of the Supreme Court reflected a change in the ideology governing reapportionment decisions from political equality to political fairness. For example, In *Allen* v. *State Board of Elections*, Chief Justice Earl Warren stated that, "Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting."[70] While the Chief Justice attempted to reject this

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[68] *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969). *Taylor* v. *McKeithen* 407 U.S. 191 (1972). In *Georgia* v. *United States*, 411 U.S. 526 (1973), *Beer* v. *United States*, 425 U.S. 130 (1976). *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976). *United Jewish Organization, Inc.* v. *Carey*, 430 U.S. 144 (1977). *Morris* v. *Gressette*, 432 U.S. 491 (1977); *United States* v. *Board of Commissioners of Sheffield, Ala* 435 U.S. 110 (1978); *City of Rome* v. *United States*, 446 U.S. 156 (1980); and *McDaniel* v. *Sanchez*, 452 U.S. 130 (1981); *UPham* v. *Seamon*, 456 U.S. 37 (1982).

[69] The apportionment cases are: *Hadley* v. *Junior College District*, 397 U.S. 50 (1970); *Ely* v. *Klahr*, 403 U.S. 108 (1971); *Abate* v. *Mundt*, 403 U.S. 182 (1971); *Minnesota State Senate* v. *Beens*, 406 U.S. 187 (1972); *Mahan* v. *Howell*, 410 U.S. 315 (1973); *White* v. *Regester*, 412 U.S. 755 (1973), *Gaffney* v. *Cummings*, 412 U.S. 772 (1973), and *White* v. *Weiser*, 412 U.S. 783 (1973), which were released on the same day; *Chapman* v. *Meier*, 420 U.S. 1 (1975); *Karcher* v. *Daggett*, 462 U.S. 725 (1983); *Brown* v. *Thomson*, 462 U.S. 835 (1983); and *Board of Estimate of City of New York* v. *Morris*, 489 U.S. 688 (1989).

[70] *Allen* v. *State Board of Elections*, 393 U.S. 544, 569 (1969).

description of voters in *Reynolds*, he could no longer ignore the reality of political communities in *Allen*. As Andrew Kull suggests, the assumptions of *Allen* suggest a new standard to determine discrimination: whether or not the voting "rights' of a specific group, in this case a protected minority class, possesses the power to vote as a racial bloc and elect a candidate of its choice.[71]

The change from *Reynolds* to *Allen* represents the problems of political equality as the guiding ideology in reapportionment. A group, not an individual, wins elections. A group displays its political power, if once aggregated together, it elects a candidate of choice, knowing that the group will be able to hold that representative accountable, especially if that candidate reflect the interests of the people.[72] Consequently, the change from the individual standard to the group standard alters the meaning of the *Reynolds* phrase of "fair and effective representation." While state legislatures can employ technology draw district lines in any number of ways to ensure a political victory and to follow the precepts of "fair" districting, such as "One Person, One Vote," compactness, contiguity, political subdivisions, the strict adherence to the ideology of political equality can dilute "fair and effective representation."

For example, consider two decisions by the Supreme Court whereby it adheres to political equality but frustrates the concept of political fairness. In *Beer* v. *United States*, the

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[71] Andrew Kull, *The Color Blind Constitution*, 214 - 215.

[72] In *Davis* v. *Bandemer*, 748 U.S. 109 (1986), Justice Stevens wrote: "The concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not. Gross population disparities violate the mandate of equal representation by denying voters residing in heavily populated districts, as a group, the opportunity to elect the number of representatives to which their voting strength otherwise would not entitle them," (167).

City of New Orleans brought forth a challenge under §5 that its districting plan for city council did not "have the purpose or effect of denying or abridging the right to vote on account of race or color."[73] At the time, 600,000 people inhabited New Orleans; 55% of the population was white while 45% was black. Since 1954, voters in the city elected two members of the seven-member city council from at-large districts and five members from individual districts, which were required to be apportioned and districted after each decennial census. In 1961, the city council redistricted, creating one wedge-shaped district and four north to south districts, resulting in the creation of one district where black residents constituted a population majority but not a registered voting majority; in the other four districts, white were the majority in both population and registered voters.[74] Because of the history of racial-bloc voting, during the 1960s a black representative was not elected to the city council. In 1970, the city council followed a similar redistricting plan, keeping the north to south district formation and the wedge-shaped district. Because of demographic changes, black citizens constituted a population majority in two districts but a registered-voting majority in neither district.[75] When the city submitted the new districting plan to the Attorney General, the AG rejected the plan because it diluted the voting strength of the black voters in the community by combining segments of the black

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[73] *Beer* v. *United States*, 425 U.S. 130, 133 (1976). The district court that heard the case ruled that the districting plan had the effect of abridging the right to vote on account of race (133). The Court challenged was brought forth by six of the seven members on the city council (134). See Footnote 3.

[74] *Beer* v. *United States*, 425 U.S. 130, 135 (1976).

[75] *Beer* v. *United States*, 425 U.S. 130, 135 (1976).

population within the white districts due to the north to south configuration of districts, which the AG stated were not necessary for, "numeric population configurations or considerations of district compactness or regularity of shape," making the selection of design arbitrary.[76] After the City and the Attorney General deliberated on what plan to adopt, the Attorney General stated that the "'the predominantly black neighborhoods in the city are located generally in an east to west progression,' and pointed out that the use of north-to-south districts in such a situation almost inevitably would have the effect of diluting the maximum potential impact of the Negro vote."[77]When the city council members received this plan, they challenged it in the United States District Court for the District of Columbia. The Supreme Court upheld the discretion of the city to create a plan with only a population majority in one district for black residents.

In *City of Mobile* v. *Borden*, 446 U.S. 55 (1980), black voters in Alabama challenged the electoral structure for the City Commission, which since 1911, elected its members through an at-large voting process. The voters challenged the political structure under §2 of the VRA and the fifteenth amendment since the system of at-large elections denied the ability of a racial minority to elect a candidate of choice.[78] The assumption behind the claim, which is consistent with *Gomillion* and *Reynolds*, is that the right to vote ought to

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[76] *Beer* v. *United States*, 425 U.S. 130, 135 (1976).

[77] *Beer* v. *United States*, 425 U.S. 130, 135 (1976).

[78] Before *Gingles*, Section §2 stated, "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."

possess meaning and it should not just focus on the physical tallying of the vote. Yet, rather then look to the ability of voters to participate effectively in the political process, a plurality of the Supreme Court misread *Gomillion* and look to the intent of the state legislators to determine if they employ the electoral structure to discriminate against black voters in the city. The opinion by Justice Stewart states that even though there is a history of racial-bloc voting, which the appellees argue is the same as being excluded from the primary process, a literal and narrow use of a doctrinal and textual argument reveals that the Court's precedent and the fifteenth amendment, "does not entail the right to have Negro [sic] candidates elected."[79] While each citizen possesses political equality and no one citizens is being excluded form the process, because of the racially polarized voting the racial minorities in the City of Mobile do not possess the voting strength to elect candidates that will provide representation. In other words, the new cases of reapportionment and redistricting are malapporitonment by other means.

Visions of Representation: Individual and Group Political Equality

In The *Concept of Representation*, Hanna Fenichel Pitkin presents six different ideal types of representation. In *Colegrove* and the pre-Baker cases, the majority of the Supreme Court discusses representation in terms of authorization where the representative has been authorized to act on behalf of the people and any act that occurs under that

[79] *City of Mobile* v. *Alabama*, 446 U.S. 55, 65 (1980). The precedent Justice Stewart cites *Smith* v. *Allwright*, 321 U.S. 649 (1944) and *Terry* v. *Adams*, 345 U.S. 461 (1953) which concern discriminatory voting practices in the Democratic primary process in Texas.

authorization equates to representation.[80] In *Baker*, a plurality challenged this view of representation because electoral structures prevented individuals from providing consent. In *Wesberry* and *Reynolds*, et al, the Supreme Court initiates a vision of representation whereby the representative is accountable to all of the people in a state. Yet, by the end of the 1960s, the Supreme Court rethought its vision of representation as state legislators found ways to exploit political equality to deny accountability for minorities in society. Yet, because of the ideological differences on the Court, the Justices fought to establish interpretive dominance as to the best form of representation to guide the process of reapportionment and redistricting. For the liberal Justices, representation concerns the group and not the individual and reaches its fulfillment on the basis of acting for a group in substantive ways. Consequently, political structures ought to protect democratic structures that allow for conceptions of political fairness of the people in opposition to the elites. Conversely, for the Conservative Justices, representation concerns the individual and democratic structures must reflect majoritarian consensus to provide authorization for the elites. Of course, in the process of enacting these views of representation, the Supreme Court must protect the Constitutional Rights of all citizens and allow state legislators the ability to pursue rational objectives in their redistricting acts.

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[80] Hanna Fenichel Pitkin, *The Concept of Representation*, (Berkeley: The University of California Press, 1967), 38. In her work, Pitkin discusses the different conceptions of representation: representation as *authorization*, which consists on giving another the authority to act; representation as *accountability*, which refers to making a representative responsible for his/her actions; representation as *descriptive*, which refers to when a person or object stands for something through resemblance or reflection that is not present; representation as *symbolic*, whereby a person or object stands for something, especially emotionally or affectively, when there is no obvious connection; and, finally, representation as *acting for*, which discusses the special relationship between the representative, the represented, the act, trust in the accomplishment of the act, and restrictions on what can be done.

The Realism of Group Representation

The group right of representation, especially against majority discrimination, develops from *Strauder* v. *West Virginia*, 100 U.S. 303 (1879) and *Hernandez* v. *Texas*, 3347 U.S. 475 (1954), both of which concern jury selection in murder cases. In *Struader*, a former slave believed that he could not receive a fair trial and, consequently, did not receive equal treatment under the law because blacks were excluded from serving on juries. The Supreme Court declared that, under the newly enacted fourteenth amendments, states were prohibited from creating laws that applied to whites and not to blacks, especially when the effects of those laws were to imply "inferiority in civil society, lessoning the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the conditions of a subject race."[81] Yet, rather than try to eliminate different standards or classes from the constitution, the Supreme Court argued that different classes must be treated alike and, in this case, equal treatment requires an open jury selection process for whites and blacks.[82]

In *Hernandez* v. *Texas*, the Warren Court extended this protection to Hispanics in Texas because of the discrimination against that group in Texas since in over 25 years no

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[81] *Strauder* v. *West Virginia*, 100 U.S. 303, 307 – 308 (1879).

[82] *Strauder* v. *West Virginia*, 100 U.S. 303, 307 – 308, (1879). The depth of this opinion seems extremely shallow, as the opinion states, "We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this," (310). The qualifications not covered by the fourteenth amendment, as disused by the Court, would be enough to prevent blacks from sitting on juries, leading to discrimination through other means.

person with a Hispanic name served as a juror in Texas. According to Chief Justice Warren:

> Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a "two-class theory" - that is, based upon differences between "white" and Negro.[83]

The importance of these decisions is to determine the questions of fact—as to whether or not a group exists and whether or not the group faces discrimination. In these cases, discrimination occurs when the group does not receive adequate representation in the jury selection process with representation referring to possessing the same physical characteristics, the same cultural beliefs, and the likelihood that the person in a position of power will act on behalf in favor for the person needing representation. Both courts realize that they must avoid the class-less theory and color-blind approach because, in both

[83] *Hernandez* v. *Texas*, 347 U.S. 475, 478 (1954).

cases, the discrimination and prejudice about "other" groups seems so pervasive that the petitioners, *Strauder* and *Hernandez*, would not receive a fair trial. In both cases, lawyers for the petitioners invoked a synendochic relationship in their argument: because of prejudices against a group or a conflict of interests between groups, a citizen needs members of his or her group to receive equal treatment under the law and to act for one another under the law.

Understanding the Democratic Experience: Virtues and Vices in Group Representation

The best understanding of the Democratic Experience through the reapportionment and redistricting decisions concerns the cultivation and the protection of a group's right to cast a meaning and effective ballot. According to Justice Powell in *Davis* v. *Bandermer*, "The concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not."[84] Districting involves some form of voter aggregation. Territorial districting groups people in relation to some defining characteristic, whether it is political interest, geographical proximity, or racial identity.[85] Combined with the implementation of gerrymandering and the winner-take-all electoral system, districting reveals how a virtue, the protection of interests and voters that would not predominant in a majoritarian electoral scheme, becomes a vice as the group in the district that cannot identify with the larger majority or the smaller majority-minority may receive little electoral protection. While an individual can change his or her mind and act

[84] *Davis* v. *Bandemer*, 478 U.S. 109, 167 (1986).

[85] Lani Guinier, "Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes," *Texas Law Review* 71 (1993): 1592.

as a rational, atomistic voter, it is usually not the case that the single individual becomes the deciding factor in an election or that a voter acts rationally.[86]

During the 1970s and 1980s, the Justices on the Supreme Court accept the premises of the Warren Court and follow the One Person, One Vote rule for apportionment. Yet, in *Ely* v. *Klahr*, the opinion by Justices Hugo Black foreshadows the problems of the Supreme Court with the concepts of political equality. According to Justices Black, the *Reynolds* rule of equal population threatens effective representation since state legislators can follow the rule of equal population and then introduce secondary criteria, such as creating compact districts, protecting incumbents, or arranging politically homogenous districts, to further legislative interests.[87] As Justice Black states, gerrymandering does not reflect the voting power of a "natural" majority, but with the manipulation of lines, a majority where it is "overwhelmingly either Republican or Democrat… [where] an incumbent had not only the natural benefits of incumbency but also the benefits (where possible) of a one party district, his own fiefdom."[88] Since *Reynolds* cannot create effective representation because of the malleability of political equality in the districting process, the Justices who concern themselves with effective representation begin to speak the language of political fairness. Yet, the disagreement over the ideology of political fairness exists in the debate as to whether representation concerns the

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[86] Bryan Caplan, *The Myth of The Rational Voter: Why Democracies Choose Bad Policies*, (Princeton: Princeton University Press, 2007), 2.

[87] *Ely* v. *Klahr*, 403 U.S. 108, 117 (1971).

[88] *Ely* v. *Klahr*, 403 U.S. 108, 117 – 118 (1971).

constitution of authoritative representation or substantive representation. Further, the Court debate the nature of representation through the legislative intent or the electoral effects of a plan; through a discussion over whether voting is an individual or group right; and through a debate on the meaning of a ballot, whether influence or winning is the proper definition for an election.

Legislative Intent and Representative Effect

In envisioning representation as authorization, the proper criterion to judge discrimination, according to the Conservative Justices, concerns the purposeful intent of the state legislators to exclude a group from the political process. By avoiding an effects test, the Conservative Justices can narrow the scope of complaints against redistricting plans and diminish the judiciary's ability to decided voting rights cases. Further, this strategy attempts to limit an expansive reading of the VRA and to ensure that vote dilution claims, or group representation, does not receive constitutional protection.

According to the Conservative Justices, *Gomillion* means that electoral discrimination occurs only through purposeful intent and not through effects. Electoral designs by themselves do not deprive an individual or a group the right to vote, only the prevention of the right to register and to cast a ballot for the candidate of their choice. According to a plurality decision in *Mobile* v. *Borden,* the Justices reasons that *Gomillion* is similar to the primary cases of *Smith* v. *Allwright*, in which the Texas Democrats used statues to exclude black candidates from the primaries, and *Terry* v. *Adams*, in which the

Jaybird Association restricted candidate access to the electoral process.[89] The lesson of *Bolden*, according to the plurality, is that "the Fifteenth Amendment does not entail the right to have Negro candidates elected.... That Amendment prohibits only purposeful discriminatory denial or abridgement by government of the freedom to vote 'on account of race, color, or previous condition of servitude.'"[90]

The requirement for intent serves as a way to tilt the balance between legislative discretion and the protection of voting rights to favor state legislators, which ensures that representation refers to authorization. As long as a governing structure treats each individual in the same way, as the use of the at-large voting does in *City of Mobile*, the state legislatures do not need to concerns themselves about the effects of an electoral scheme or representation. As Andrew P. Miller and Mark A. Packman note, an effects test expands the power of the judiciary into reapportionment law and allows the court to develop proportional remedies to districting plans.[91] Abigail M. Thernstrom writes that if an effects or a result test replaces an intent test, a "fair shake" becomes a "fair share," and "assumes the existence of a racially based entitlement to a proper share."[92] Consequently, the effects test introduces a redistribution of power between the majority and the minority

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[89] *Mobile* v. *Bolden*, 446 U.S. 55, 64 (1980). The Jaybird Organization was a private organization that played an important role in Texas politics since the candidate chosen in the Jaybird primary won the Democratic primary and the general election.

[90] *Mobile* v. *Bolden*, 446 U.S. 55, 65 (1980).

[91] Andrew P. Miller and Mark A. Packman, "Amended Section 2 of the Voting Rights Act: What is the Intent of the Results Test?" *Emory Law Journal* 36 (1987): 3 – 4.

[92] Abigail M. Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights*, (Cambridge: Harvard University Press, 1987), 123.

and between the legislative branch and the judicial branch. Opposition to an intent test view it as another barrier to casting a meaningful ballot, leading to the development of vote dilution and another indirect method by which state legislators prevent racial minorities from achieving political equality at the polls. As a heresthetical strategy, vote dilution combines interests to ensure that one interest cannot succeed at the polls. It concerns the integration and aggregation of black voters into districts with others they do not share interest with but cannot win elections because of sheer numbers.[93] If done the *correct way*, state legislators can develop a plan of integration and prevent some members of the community from receiving meaningful political representation. Consequently, like the pre-*Baker* reapportionment decisions, the reliance on state discretion as a virtue becomes a vice for those seeking political equality as voting concerns a social or political right rather than a fundamental right.

Further, an intent test creates an incredibly high burden of proof to establish discrimination. As Justice Marshall states in *Mobile* v. *Borden*, the intent test when applied to at-large and multi-member elections overlooks the historical and social factors that prevent racial minorities from achieving political equality and leaves citizens with little recourse to challenge the political structure in areas that contain racial-bloc voting or receive the support of representatives who will speak and act for them. Citing the use of an effects test in *White* v. *Regester*, Justice Marshall states, "*White* stands for the proposition that an electoral system may not relegate an electoral minority to political impotence by

[93] Dianna M. Pinderhughes, "Legal Strategies for Voting Rights: Political Science and the Law," *Howard Law Journal 28* (1985): 519.

diminishing the importance of its vote. The plurality's approach requiring proof of discriminatory purpose in the present cases is, then, squarely contrary to *White* and its predecessors."[94]

To protect the discretion of the state-legislators, the voting rights of citizens, and incorporate an ideology of political fairness to the political process, the judiciary must reject an intent test. According to Justice Stevens, an intent test is a subjective inquiry into legislative motive and, because of the numerous people involved with redistricting plans, the intent test concerns an epistemological test to find "whose intent controls," i.e., out of the numerous state agents, how could the court determine which views are relevant or irrelevant, rational or irrational, necessary or sufficient. Further, the search for intent denies the role of the voter in the legislative process since they ask representatives to speak for them and, certainly, some of the voters in the South could ask their representatives for racial vote dilution.[95] Since the districting process concerns tradeoffs between competing group interests, the judiciary must find a balance between some toleration of advantaging or disadvantaging some interests; it must protect the ability of voters to prove discrimination without knowing the subjective motivations of the legislators; and it must protect the authority of the state to conduct representation.[96] To reach this balance, the

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[94] *City of Mobile* v. *Borden*, 446 U.S. 55, 112 (1980). Here, Justice Marshall cites *White v. Regester*. 412 U.S. 755 (1973). Ironically, if Mobile altered its election structure to an at-large format after November of 1964, as Mississippi did in *Allen*, then the Attorney General would not have precleared the change or the Supreme Court would have struck the plan down because it would have diminished the right to vote under the VRA.

[95] *Rogers v. Lodge*, 458. U.S. 613, 647 (1982).

[96] *City of Mobile* v. *Borden*, 446 U.S. 55, 91 - 92. (1980). Also, see footnote 12.

Court must adhere to "objective" factors that provide a context for the redistricting plan, leading to the recognition of a "totality of circumstance" test.[97] Finally, the rejection of an intent test is important to avoid a case by case review of apportionment that denies impartiality necessary to the Equal Protection Clause. To avoid this, what is necessary is the finding that a plan significantly decreases the political power of a group and departs from the neutral criteria of reapportionment.[98]

The Nature of Group Representation

Throughout the 1970s and the 1980s, the idea that representation occurs for groups rather than the individual usually correlates to ideological position of the Justices, with the liberal justices supporting group representation and the conservative justices rejecting group representation to focus on the atomistic, individual voters. Rejection of group-representation focuses on the requirement for all groups to receive representation and the development of a "quota" system, which hinders the advancement of the American ideal. Support for a group right to vote, especially for racial vote dilution cases, focus on the historical circumstances surrounding racial-bloc voting in relation to the facts of the case and the acceptance of racial classifications to develop group representation, especially when groups in power do not speak or act for groups out of power.

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[97] See page in the next section. See also J. Morgan Kousser for a list of ten factors to determine the "intent" of lawmakers. J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction*, (Chapel Hill: University of North Carolina Press, 1999), 347.

[98] *Karcher* v. *Dagget*, 462 U.S. 725, 753 – 754, (1983).

In *Whitcomb* v. *Chavis*, the opinion of Justice White fluctuates between understanding representation in terms of the *Reynolds* standard of the individual and the protection of group interests. In *Whitcomb*, the challengers argued that as residents of the Ghetto area, who happen to have different cultural, economic, and political interests than those from the white suburbs, were unable to receive effective representation because they resided in multi-member districts. While Justice White did not deny the different interests, he argued that the record did not show that blacks, on an individual level, were prohibited from registering, participating in elections, or from supporting candidates.[99] Further, Justice White refused to see this as a racial issue as the county elected six other blacks, who were Republican and not from the Ghetto area, to the state legislature.[100] Between 1960 and 1968, only three members of the state legislature who represented Marion County were black Democrats.[101]

Yet, with the creation of safe majority-minority districts, fair representation for racial and ethnic groups would exist through sum of elections at the county level and not the individual district. Noting that voting against a candidate because of the candidate's race is unfortunate, but not rare, Justice White argues that "the individual voter in the district with a nonwhite majority has no constitutional complaint merely because his

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[99] *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971).

[100] J. Morgan Kousser, *Colorblind Injustice*, 335. Two years later, Justice White would support the recognition of a group right to representation in *White* v. *Regester* as he wrote that a ruling by a District Court in Texas dismantling multi-member districts for black and Hispanics was warranted because of the history of official racial discrimination and the residual effects of that discrimination in the fields of education, employment, economics, health, politics and others. See *White* v. *Regester* 412 U.S. 422, 767 – 768 (1973).

[101] J. Morgan Kousser, *Colorblind Injustice*, 335.

candidate has lost out at the polls and his district is represented by a person for whom he did not vote."[102] If the state possesses the power to create a redistricting plan that is fair to the major political parties, then the state can develop a districting plan that can create districts on the basis of race, especially when racial bloc voting prevents racial minorities from achieving political equality.[103] The logic of the argument means that the plaintiffs would not lose representation because they could not elect a candidate of choice because other "white" candidates would be elected in the county and those officials would represent the interests of "whites." Consequently, "whites" were not forced out of the political process because they would still receive representation; the 1974 plan sought only to "achieve a fair allocation" of political power between white and nonwhite voters.[104]

As Justice White notes in *Whitcomb*, political fairness becomes a vice through the protection of multiple groups, diminishing the authority of the state legislators. If the Supreme Court were to protect the group interests one racial group, then there is very little containing the Supreme Court in protecting the rights of all groups. By protecting one group, the Supreme Court creates a standard that reflects the, "general proposition that any group with distinctive interests must be represented in the legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area

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[102] *United Jewish Organization* v. *Carey*, 430 U.S. 144, 167 (1977).

[103] *United Jewish Organization* v. *Carey*, 430 U.S. 144, 167 (1977). In *Gaffney* v. *Cummings*, 412 U.S. 735, 751 – 754 (1973), the Supreme Court argued that if the political parties desire to achieve political fairness and proportional districts in accordance with political identifications of its citizens they could do so.

[104] *United Jewish Organization* v. *Carey*, 430 U.S. 144, 167 (1977).

sufficient to constitute a single-member district."[105] Relying on a slippery slope argument, Justice White asserts that if Supreme Court protects a racial minority, then it ought to protect "union orientated workers, the university community, religious or ethnic groups occupying identifiable areas of our heterogeneous cities and urban states."[106] Consequently, the judiciary would possess the authority to remake the composition of Congress and state legislatures. To argue against group representation, the Conservative Justices state that the introduction to group representation will lead to the development of proportional representation that stands in contradiction to the vision of American representation. This argument connects with their advocacy of understanding representation in terms of legislative intent and opposition to unnecessary judicial involvement in districting. Without focusing on intent, the judiciary would need to decide cases without judiciable manageable standards, enlarging the arbitrary authority of the judiciary and enabling the justices to read their own legal and partisan interests into the controversy and diminishing the liberty of the proper authority, the state governments.[107] In *Rogers* v. *Lodge*, Justice Powell concludes that without "compelling reasons of both law and fact," the judiciary cannot restructure a political system to enforce the adoption of quotas or group representation, which would be, "antithetical to the principles of our

[105] *Whitcomb v. Chavis*, 403 U.S. 124, 156 (1971).

[106] *Whitcomb v. Chavis*, 403 U.S. 124, 156 (1971).

[107] *Rogers* v. *Lodge*, 458 U.S. 613, 629 – 631 (1982) .

democracy.[108] Mimicking the traditional complaints about judicial action in districting and apportionment, political fairness in the electoral process requires the removal of the subjective whims of the judiciary to return the districting duties to the political bodies within the states. Yet, this passage does more to deflect away from the area of apportionment than appropriately discuss this topic.

With the use of "quota," Justice Powell attempts to locate unsettled areas of apportionment law within settled constitutional doctrine, alluding to his majority opinion in *The University of California Regents* v. *Bakke*, the case in which the Supreme Court held that the use of quotas were unconstitutional because they violated the equal protection of the laws. The implicit analogy is that the judiciary or state institutions cannot develop apportionment plans that empower minority groups since protecting certain groups would violate the Equal Protection Clause. "The concepts of 'majority' and 'minority' itself," according to Justice Powell in *Bakke*, "is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private tolerance."[109] Because of the fluidity of group identity, the role of the judiciary is to stand aside, allow citizens to identify with whom they chose, and allow state politics to develop organically. The judiciary could enter into a debate in order to "discern

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[108] *Rogers v. Lodge*, 458 U.S. 613, 630 (1982) .

[109] *University of California Regents* v. *Bakke*, 438 U.S. 265, 296 (1978). In addition, Justice Powell's argument seems to rely on the notion that any form of group representation is a fallacy of composition. In *Bakke*, he states that the fourteenth amendment governs individual rights and to give special preference to an individual to help the individual's race is in violation of the fourteenth amendment. This leads to the "treat individuals as individuals" argument, which may not apply to elections since individuals do not win elections.

'sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments."[110] Even if there is past discrimination, the Court cannot rule in favor and provide a remedy for one minority group at the expense of other groups; the judiciary could only enter under special circumstances, such as when it acts under the authority of the VRA. Instead, as Justice Powell states in *Rogers* v. *Lodge*, the "principles of our democracy" means that citizens must work to persuade one another, even in the area of race relations, if there are to be remedies to the absence of voices. Further, with the slowdown of integration after *Brown* v. *Board*, it seems that the conservative position is that the law can only do so much to persuade someone to change their position of race and identity and that the area of race relations needs to develop outside of the law, even outside of legislative act. Without any specific act of discrimination the proper scope of race relations, is political and not legal.

However, by examining the actual voting practices in certain areas, the moderate and liberal Justices redefine representation as a group right, especially in light of the necessity of the VRA and the development of racial bloc voting. The necessity of acknowledging representation as a group right develops from the vices of a majoritarian representation. According to Benjamin R. Barber, the discussion of equality in terms of electoral equality deflects attention away from "crucial economic and social detriments that shape its real-life-incarnation. In the absence of community, equality is a fiction that

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[110] *University of California Regents* v. *Bakke*, 438 U.S. 265, 299 (1978).

not merely divides as easily as it unites but that raises the specter of a mass society made up of indistinguishable consumer clones."[111] Samuel Issachrof notes, racial-bloc voting plays such a prominent role in American politics, that in order to predict the outcome of an election for a minority office-holder, one needs to examine the racial composition of the jurisdiction.[112] Racial-bloc voting acts as a majority faction in the Madisonian sense, which because of the passions of the majority, political minorities cannot find success though elections. Electoral systems that perpetuate the majority dominance and a monopoly of the political process undermine the meaning of effective representation in *Reynolds*. Issachrof states that, "Combined with the greater wealth, education, and resources of the majority white community, white bloc voting robs representative systems of any presumed entitlement to deference."[113] For example, in *Beer* Justice Marshall cites the long history of discrimination of voting, public schools, public assemblies, public recreational facilities, public transportation, housing, and employment; further, since racial-bloc voting was the norm, the white representatives ignored the plight of the blacks and since tickets, not individuals, won elections in New Orleans, without a system of representation of political equality at the group level, then blacks would suffer from a lack of representation whereby they were "represented" by members of another group. For Justice Thurgood Marshall, the best way in which to control the passions of the majority is

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[111] Benjamin R. Barber, *Strong Democracy*, 146.

[112] Samuel Issacharoff, "Polarized Voting and he Political Process: The Transformation of Voting Rights Jurisprudence," *Michigan Law Review* 90 (1992): 1854 – 1855.

[113] Samuel Issacharoff, "Polarized Voting and he Political Process," 1862.

to fairly proportional the political power, protecting the political equality of both and ensuring that a majority faction cannot ignore or refuse to deliberate with a minority faction about the community goals and resources.

One year after its decision in *Beers*, the Supreme Court upheld a decision by New York State Legislators to develop political quality for racial minorities by providing them with safe majority-minority districts. In *United Jewish Organization* v. *Carey*, 430 U.S. 144 (1977) (UJO hereafter), the Supreme Court states it is not unconstitutional to rely upon racial classifications to draw district lines in order to gain preclearance approval for the Attorney General even if, as a result, the state legislators of New York diminishes the voting power of another historically oppressed group.[114] In his decision, Justice Byron White argues that with the history of racial bloc voting, and the likelihood that it would continue even after the VRA, it is not unconstitutional for the state legislators to take race into account when creating fair districts. Relying on the authority of the VRA, the decision allows the consideration of race if it enhances the voice of racial minorities when they would otherwise be voiceless. By considering race, the state legislators of New York could ensure that racial minorities possessed some level of political equality and

[114] Because of low voter registration and discrimination against blacks, Kings County, NY (Brooklyn) was subject to the VRA. In 1972, state legislators submitted a plan to the Attorney General, which he rejected because the plan did not demonstrate that its purpose of effect did not discriminate. In 1974, the state legislators resubmitted a plan that created safe districts whose population contained 65% non-whites. 65% was the baseline as this is what a member of the districting committee and the Department of Justice believed to be necessary for a non-white community to elect a candidate of choice. Yet, to achieve these non-white majorities, the state legislators divided the Hasidic Jewish community in Williamsburg. In response, the Hasidic Jewish community challenged the plan, first, as a community of interests, and when that failed, as white citizens, claiming that the creation of safe-districts constituted an electoral quota that violated the Fourteenth Amendment and the use of racial classifications violated the Fifteenth Amendment.

representatives could act on the group's behalf. This protection of group representation occurs so long as the state legislators do not discriminate against other voters. However, just because a plan promotes the interests of one group does not mean that it discriminates against another group or abridges the right to vote for another group.[115]

Yet, with the creation of safe majority-minority districts, fair representation for racial and ethnic groups would exist through sum of elections at the county level and not the individual district. Noting that voting against a candidate because of the candidate's race is unfortunate, but not rare, Justice White argues that "the individual voter in the district with a nonwhite majority has no constitutional complaint merely because his candidate has lost out at the polls and his district is represented by a person for whom he did not vote."[116] If the state possesses the power to create a redistricting plan that is fair to the major political parties, then the state can develop a districting plan that can create districts on the basis of race, especially when racial bloc voting prevents racial minorities from achieving political equality.[117] The logic of the argument means that the plaintiffs would not lose representation because they could not elect a candidate of choice because other "white" candidates would be elected in the county and those officials would represent the interests of "whites." Consequently, "whites" were not forced out of the

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[115] *United Jewish Organization* v. *Carey*, 430 U.S. 144, 165 (1977).

[116] *United Jewish Organization* v. *Carey*, 430 U.S. 144, 167 (1977).

[117] *United Jewish Organization* v. *Carey*, 430 U.S. 144, 167 (1977). In *Gaffney* v. *Cummings*, 412 U.S. 735, 751 – 754 (1973), the Supreme Court argued that if the political parties desire to achieve political fairness and proportional districts in accordance with political identifications of its citizens they could do so.

political process because they would still receive representation; the 1974 plan sought only to "achieve a fair allocation" of political power between white and nonwhite voters.[118]

The Meaning of the Ballot: Influence or Selection

According to Justice Byron White in *Whitcomb* v. *Chavis*, the proper way to understand the meaning of a ballot is through its potential to influence an election rather than win an election. In *Whitcomb*, the District Court found that the black residents of the Center Township Ghetto constituted a cognizable minority group, which if elected through single-member districts rather than multi-member districts, would constitute a majority in three districts.[119] Though the opinion by Justice White notes that multi-member districts can dilute the meaning of a ballot and reduce the quality of effective representation, the lack of proportionality does not mean that state legislatures invidiously discriminate against its citizens.[120] Instead, Justice White states that the proper view of this case is that, "the failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes [sic]. The voting power of ghetto residents may have been 'cancelled out' as the District Court held, but this seems a mere euphemism for political defeat at the

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[118] *United Jewish Organization* v. *Carey*, 430 U.S. 144, 167 (1977).

[119] *Whitcomb v. Chavis*, 403 U.S. 124, 135 (1971). In addition to race, the District Court that the residents of the Ghetto area possessed similar legislative and political interests in such areas as "urban renewal and rehabilitation, health care, employment training and opportunities, welfare, and relief of the poor, law enforcement, quality of education ,and anti-discrimination measures," (132).

[120] *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971).

polls."[121] Rather than focusing on winning an election, the ballot must refer to the ability of a voter to influence an election, which the plaintiffs could not do.

By protecting influence as the proper understanding of the ballot, Justice White believes, as Justice Frankfurter did before him, that a virtue in representation concerns ensuring that the people who must be vigilant in searing the conscience of the legislators. Even safe districts because a vice of representation as the people who reside in safe districts regularly do not need to engage actively political associations or political issues. White writes that even for safe or competitive districts, single-member districts of multi-member districts, "As our system has it, one candidate wins, the others lose. Arguably the losing candidates' supporters are without representation since the men they voted for have been defeated; arguably they have been denied equal protection of the laws since they have no legislative voice of their own."[122] Yet, the creation of safe, single-member districts may not provide accountability or enhance the quality of representation as the citizens within the multi-member districts possess a greater chance to influence the election and legislative acts since those citizens can vote for more representatives.

Yet, this position returns the Supreme Court to the pre-*Baker* cases since the design of the multi-member district creates a situation whereby suburban whites and Ghetto area blacks fought for control over the political process and the available community resources. When discussing the facts of *Whitcomb*, Justice White notes that

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[121] *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971).

[122] *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971).

excluding the middle-class black district, the wealthy suburban area contained 13.98% of the population as received 47.52% of the county's representatives while the Ghetto area contained 17.8% of the population and 4.75% of the representatives.[123] Because of racial-bloc voting and partisan tensions, which Justice White downplays because black Republican candidates were elected in Marion County, residents of the Ghetto area could rarely elect candidates of choice in a multi-member district though they would possess the ability to do this in single-member districts. This means that even with an influence criterion to judge the effectiveness of a ballot, reasons exist as to why a group cannot can the necessary influence to win elections consistently. Throughout the reapportionment and redistricting cases, when groups of individuals possess competing interests, it is rare that the group in power shares these resources. Exacerbating the competition between interests is the presence of race. As Alexander Keyssar notes, that voting rights cases concerning race reveal the historical truth that, "there was always conflict about the breadth of the franchise and that those who possessed it could not necessarily be counted on to extend the right to others. Faced with this reality, it made sense for an insulated institution such as the Court to defend what is believed to be a fundamental feature of American politics."[124] Without the ability for a political group to elect a candidate of choice, the design of a district may diminish the ability for minority political groups to

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[123] *Whitcomb v. Chavis*, 403 U.S. 124, 133 (1971).

[124] Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States*, (New York: Basic Books, 2000), 270.

elect candidates, then the functional definition of influence means that the minority candidates cannot achieve political equality.

The problem, as Justice William Douglas argues in his dissent, is this case is not political, it is racial. Douglas writes that the "problem of the gerrymandering" concerns the way in which state legislators circumvent the sentiments of the community and it is the "problem of the law" that concerns how to prevent it.[125] The multi-member districts in this case allow for the white voters, from "upper-middle class and wealthy" suburbs, to surround and dilute the votes of black residents in the Ghetto area, diminishing "fair representation" since the lines outweigh the votes of one race more than another.[126] Justice Douglas states that under the authority of the Fifteenth Amendment the Supreme Court possesses the power of state legislators to "abridge" the voting power of racial minorities and to ensure that the dictate of Reynolds does not mean, "One White Person, One Vote."[127] Even though the citizens may be Democrats or Republicans, the citizens from the urban areas possess less power and less influence and, hence, less ability to persuade state legislators to see beyond race and support the interests of the Ghetto community.

While Justice White may be correct that one of the most important virtues for a democracy is the ability to influence an election that influence needs to develop with an

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[125] *Whitcomb v. Chavis*, 403 U.S. 124, 177 (1971).

[126] *Whitcomb v. Chavis*, 403 U.S. 124, 176 - 177 (1971).

[127] *Whitcomb v. Chavis*, 403 U.S. 124, 180 (1971).

additional virtue of competitiveness where the design of the district promotes democratic deliberation and minimizes impediments to deliberation, such as racial-bloc voting. Where there may be good reasons to advocate for "safe" districts, as I will discuss later, the districts in question in Whitcomb, as well as others involving racial bloc voting, reduces the possibility that a voter of one race can influence a candidate or a group can influence an election. Influence, as a democratic virtue, can succeed only when competing parties possess the actual ability to influence others. Since racial group identity, anathema to American politics, hinders the ability of groups to influence one another, other forms of influence must prevail. Besides hindering the ability of voters "knowing" their representatives,[128] multi-member districts that secure representation for some citizens while ignoring other citizens who could form an autonomous district themselves diminish the ability of those in the minority to influence elections unless they identify against their interests and receive "representation" by the candidate of the majority.

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[128] In addition to diluting the vote of politically cohesive groups, multi-member districts contain a hidden vice as those districts diminishing the quality of the connection between a representative and his/her constituency though if representation refers to authorization that does not matter. Multimember districts, and floterial districts, provide a way for states to deal with their own individual exigencies and provide the state legislatures some leniency in the "as nearly practical" standard though district courts cannot employ them. See *Reynolds* v. *Sims*, 377 U.S. 35, 576 – 579, (1964). In *Conner* v. *Johnson*, 402 U.S. 690, and upheld in *Connor* v. *Williams*, 404 U.S. 549, 551, *Mahan* v. *Howell*, 410 U.S. 315, 333 (1973), and *Chapman* v. *Meier*, 420 U.S. 1 (1975). Though constitutional, the Supreme Court believes that these districts are not desirable. In *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, (1964), the Supreme Court noted that in the counties that received more than one seat, the voters elected the representatives through an "at large" basis, making ballots "long and cumbersome" and increasing the difficulty for voters to make an "intelligent choice among candidates," (731 – 732). Furthermore, the "at large representation" in multi-member districts separates the voter from the representative. The Court states, "no identifiable constituencies within the populous counties resulted, and the residents of those areas had no single member of the Senate or House elected specifically to represent them. Rather, each legislator elected from a multimember county represented the county as a whole," (731 – 732).

By conceptualizing representation in terms of authorization, the Conservative Supreme Court Justices attempt to increase the power of the state legislators in conducting representation and diminish the influence of political groups and the judiciary. Conversely, by defining representation in terms of substantive representation, the Liberal Justices desire to expand the scope of representation and allow political and racial minorities, who have been shut-out of the process, to receive benefits and share burdens. Because of these competing views of representation, the Justices present difference visions of democracy and seek to gain interpretive dominance for their visions of democracy through their rulings.

Visions of Democracy: Competing Structures of Government

While the Justices on the Court disagreed over what constituted the proper characterization of representation, the Conservative, Moderate, and Liberal Supreme Court Justice disagreed also on what ought to be the proper characterizations of a Democratic form of government. Even the Conservative Supreme Court Justices, who argue that representation concerns authorization, cannot avoid envisioning the best arrangement of the Country's political institutions. Though there exists a seemingly endless amount of ways in which to define democracy and the Supreme Court possesses a "democracy-defining dilemma," when the Supreme Court hears cases that cover certain topics such as reapportionment and redistricting, the Court must offer some definition of

democracy to resolve these cases.[129] I will begin by discussing two ideal forms of government: a deliberative model represented through the work of John Dewey, and an Elite model, represented by the work of Richard Posner.

Dewey, Posner, and the Concepts of Democracy

In *The Public and Its Problem*, John Dewey writes that "governmental institutions are but a mechanism for securing to an idea channels of effective operation."[130] The problem of the public, as Dewey sees it, is to secure "recognition of itself as will give it weight in the selection of official representatives and in the definition of their responsibilities." For Dewey, it is the concern of the people to find ways to develop better institutions and better communities through the cultivations of the necessary habits. Representative government must, according to Dewey, find its foundation from the public interests rather than the desires of the elites who disregard the public.[131] To improve deliberation, Dewey believes that the public needs to cultivate the habits of democracy and especially improve upon the "methods and conditions of debate, discussion, and persuasion" leading to a political consensus.[132] Based on this view of the public and the need for deliberation, the

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[129] Lori Ringhand, "Defining Democracy: The Supreme Court's Campaign Finance Dilemma," *Hastings Law Journal* 56 (2004): 77. Ringhand states that there are two important political questions that must be answered: The day to day questions of policy preferences and, the more fundamental set of questions, about the political process: what type of democracy we live in? To see how the Court creates images of democracy, see Richard H. Pildes, "*Bush* v. *Gore*: Democracy and Disorder," *University of Chicago Law Review* 68 (2001): 695.

[130]John Dewey, *The Public and Its Problems*, (Athens: Ohio University Press, 1954) 143.

[131] John Dewey, *The Public and Its Problems*, 182.

[132] John Dewey, *The Public and Its Problems*, 208.

question becomes what is the best way to develop an institutional framework that will develop the democratic habit even in competing publics.

In *Law, Pragmatism, and Democracy*, Richard Posner labels this type of Democracy as Concept I Democracy. Concept I Democracy rests on the premise that citizens possess a moral right to participate in government and retain moral duties to participate in that government.[133] Because of the desire to establish a social consensus on American policy, Concept 1 Democracy develops as a type of Deliberative Democracy whereby citizens must be willing to modify their conception of the public good, they must be responsive to reasons offered by others, and must openly commit themselves to act on a modified version of the public good.[134] Of course, Posner rejects this type of democracy because it fails to present a credible account of how citizens with competing premises and self-interests debate with one another over the common good of society. For Posner, Concept I Democracy occurs as faculty members in a workshop: "deliberative democracy is the 'democracy' of elite intellectuals."[135]

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[133] Richard Posner, *Law, Pragmatism, and Democracy*, (Harvard: Cambridge University Press, 2003), 131. According to Posner, the moral duties are: first, citizens take sufficient interest in public affairs; second, they discuss issues in an open-minded fashion; and third, base their political decisions on an honest assessment of the problems at hand rather than on just self-interest.

[134] Richard Posner, *Law, Pragmatism, and Democracy*, 132. Posner also discusses, and dismisses, a "transformative democracy" whereby, "all institutions, not just political ones, were subject to democratic control but the people affected by them, so that factories were controlled by workers, consumers, and suppliers as well as by managers and owners, and universities by students and staff as well as by faculty members and trustees, society would by fundamentally transformed, presumably in the direction of utopian socialism," (133).

[135] Richard Posner, *Law, Pragmatism, and Democracy*, 136.

In opposition, Posner presents Concept II Democracy, which relies heavily on the elite conception of democracy by Joseph Schumpeter in *Capitalism, Socialism, and Democracy*. While Concept II democrats do not disparage the need or benefits of debate in society, they also do not believe, as Chief Justice Earl Warren believed in *Reynolds*, that you can separate the interests from the people and may call into question the "liberty of the moderns," or the civil liberties of the people.[136] Richard Posner describes the characteristics of this Elite Democracy (Concept Type II Democracy) as one as being a "method by which self-interested political elite compete for the voters of a basically ignorant and apathetic, as well as determinedly self-interested electorate."[137] Concept II democracy, according to Posner, is the "democracy of interests and so of responsiveness to public opinion"[138] and serves as the best method of governance for people who concerns themselves with private rather than public affairs since politics has little intrinsic value and is not ennobling.[139] In this type of democracy, the political parties attempt to drive toward the middle to pick up as many votes as possible to win office though if these elected officials do not perform well for the political consumers, then the voters may choose to fire the officials at the end of their term.[140] Concept II Democracy, according to Posner,

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[136] Richard Posner, *Law, Pragmatism, and Democracy*, 140.

[137] Richard Posner, *Law, Pragmatism, and Democracy*, 16.

[138] Richard Posner, *Law, Pragmatism, and Democracy*, 165.

[139] Richard Posner, *Law, Pragmatism, and Democracy*, 144.

[140] Richard Posner, *Law, Pragmatism, and Democracy*, 144, 152 - 153.

does not concern self-government but "government subject to checks."[141] It loathes third parties, which may bring sharply divided ideological parties though it needs the threat of third parties to preserve competition among the two-party system.[142]

While Posner presents these two types of democracy as being incompatible, the Supreme Court's partisan reapportionment and redistricting decisions presents a way in which to find institutional and political reconciliation between these two conceptions of democracy. While the elite conception of government serves as a reminder of the lack of involvement in the political process and the lack of desire to understand public policy questions, it fosters a belief that civic participation, even in voting, means very little. If the focus of deliberation and the instillation of democratic virtues, the strength of Concept I Democracy, is not possible, even though electoral design, then the reasons for civic participation decreases. For Posner, the advantage of Dewey's epistemic democracy is not the focus on deliberation or high-mindedness, but that it determines public opinion.[143] Yet, the Elite Conception of democracy leads to the manipulation of public opinion through the manipulation of electoral districts. The strength of the Supreme Court's vision of democracy would be a blend of these two types of democracy where it encourages meaningful deliberation in the process of elections even if the result resembles an Elite consensus. This becomes especially important as the Justices engage in a debate over the best form of democracy through the experience of racial and partisan conflicts.

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[141] Richard Posner, *Law, Pragmatism, and Democracy*, 164.

[142] Richard Posner, *Law, Pragmatism, and Democracy*, 170.

[143] Richard Posner, *Law, Pragmatism, and Democracy*, 108.

Race and Representation, Majoritarian and Pluralistic Democracy

In the cases of *Mobile* v. *Borden,* and *City of Rome* v. *The United States*, the Supreme Court took two different directions in its voting rights jurisprudence. In Mobile, the Conservatives Justices prevailed in a 6 –3 decision, holding that the City of Mobile's County Commissioner election system, which has been in use since 1911, did not dilute the voting strengths of black Americans under the Fourteenth Amendment and that racial minorities do not have the right to elect their candidates of choice under the Fifteenth Amendment. Yet, to the dismay of the Conservatives Justices, in 6 – 3 decision in *City of Rome*, the Liberal Justices held that the Rome must comply with the preclearence authority under §5 and that the its change in voting procedures possessed a discriminatory effect of diluting the right to effective participation.[144] Two years after *Mobile* v. *Borden*, the Supreme Court issued a 6 – 3 decision in *Rogers* v. *Lodge*, ruling that the electoral practices in Burke County, Georgia possessed discriminatory effects against racial minorities. In *Rodgers*, the Liberal wing of the Court persevered as the Chief Justice Warren Burger switched positions and the newly appointed Justice Sandra Day O'Connor replaced the Conservative voice of Justice Stewart. The symbolism of *Rogers* revealed the Court's new position on race as it reflected the mandates of Congress in the newly amended §2 of the VRA. It also revealed the ideological division between the Conservative and Liberal

[144] In *Mobile* v. *Borden*, the Court upheld the at-large electoral scheme because of tradition, not effects, as the City relied on it since 1911 though it clearly affected the voting strength of racial minorities. In *City of Rome*, the changes from plurality-win to majority-win for elections, reduction of number of wards from 9 to 3, the staggering of terms for commissioner positions, and residential requirements possessed the effect of diminishing the effective participation for racial minorities. See *City of Rome* v. *U.S.*, 446 U.S. 156, 172 – 183 (1980).

Justices over the Supreme Court's vision of law and democracy. For the Conservative Justices, the vision of representation as authorization creates democratic structures that envision the country as a majoritarian democracy, promoting a conception of the individual and rejecting a conception of the group. Conversely, because of their view of substantive representation, the Liberal Justices argue that democracy concerns the protection of pluralism in order to achieve the Democratic Experience.

Throughout vote dilution and §5 cases during the 1970s and 1980s, the Conservative Justices employed a strategy in their majority, plurality, and dissenting opinions to limit an expansive interpretation of the VRA. In his dissenting opinion in UJO, Chief Justice Burger argued against the Court's decision, stating that achieving a safe district for racial minorities constituted an electoral quota and that even though the districts were created to comply with the VRA they were not constitutional.[145] In *Beer* v. *United States*, the Conservative Justices established the nonretrogression test to limit the scope of the VRA's substantive requirements. In *United States* v. *Sheffield*, 435 U.S. 110 (1978), Justice Stevens argued that according to the language of §4, the city of Sheffield, Alabama, and all cities, could not be included under the definition of State or political subdivisions since the definition for political subdivision referred to "any county or parish, except where registration for voting is not conducted."[146] Already displeased with the Attorney General's authority to "make sovereign states submit its legislation to federal

[145] *United Jewish Organization* v. *Carey*, 430 U.S. 144, 182 – 187 (1977).

[146] *United States* v. *Sheffield Board of Commissioners,* 435 U.S. 110, 141 – 142 (1978). In *Sheffield*, the Court ruled that the City adoption of a mayor-council for its form of government needed precleaance under §5.

authorities before it may take effect,"[147] the majority's opinion in *City of Rome* reduced the Conservative Justice's belief that the VRA applied to the political process and not to "fair and effective representation." In *City of Rome,* Justice Powell criticized the majority for reading evidence into the record to support a claim of vote dilution since white officials were "responsive to the needs and interests of the lack community'" and actively sought the political support from the black community."[148] Justice Rehnquist attacked the deviation from the Court's tradition and stated that, in *Mobile*, the Court "correctly concluded" that a city has "no obligation under the Constitution to structure its representative system in a manner that maximizes the black community's ability to elect a black representative." If the Court were to follow precedent, the Court should not prevent the city of Rome, GA to adopt a structure in which is constitutional for Mobile, Al.[149] Because of the apparent contradiction in results over arguments for the same system, Justice Rehnquist argues that the Court should not abdicate its authority, meaning the Court should either free City of Rome or determine that certain provisions of the VRA are unconstitutional.

Beneath the Conservative opinions in the vote dilution and §5 cases exists a cultural anxiety about political groups, especially racial groups, receiving representation as groups within the democratic structures of the United States. At the center of this anxiety

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[147] *Georgia* v. *United States*, 411 U.S. 526, 543 (1973).

[148] *City of Rome* v. *U.S.* 446 U.S. 156, 195 (1980).

[149] *City of Rome* v. *U.S.* 446 U.S. 156, 207 (1980).

is the interpretation of the VRA and its implication for democracy concerns the use of the controversial legislation after Congress and the judiciary ended the use of literacy tests and poll taxed, and opened up the political process to allow racial minorities to compete for political equality. In Allen, Chief Justice Warren argued that the legislation should be interpreted broadly as its purpose was to stay ahead of electoral devices that would stay ahead of political majorities disenfranchising minorities. In this view, when state, county, and city officials altered voting practices, such as switching from district to at-large elections, and the Supreme Court and the Attorney General argued this violated the VRA, the Court and the DOJ upheld the telos of the act. By ruling these electoral changes were an attempt to impair participation in the electoral process, the Court pursued decisions similar to its work in as in *Baker*, *Weberry*, and *Reynolds*.

Ideological opposition to the expansive reading of the VRA followed the warnings of Justice Felix Frankfurter and Justice John Marshall Harlan that the Court ought to avoid the political thicket for democracy's sake. In *Whose Vote Counts?*, a text that represents this opposition and one that would influence Justice Clarence Thomas' dissenting opinion in *Holder v. Haller*, 512 U.S. 874 (1994), Abigail M. Thernstrom writes that the single aim of the VRA concerns black enfranchisement in relation to registration and voting.[150] Yet, after *Allen,* the Supreme Court exceeded its authority as it handed down rulings that judged the substance of representation and unconstitutionally

[150] Abigail M. Thernstrom, *Whose Votes Count?* 3 - 4.

diminished the power of state legislators to conduct representation. *Whose Vote Counts?* states:

> Provision initially inserted to guard against the manipulation of an electoral system for racist ends has thus evolved as a means to ensure that black votes have value—have the power, that is, to elect blacks.... We have arrived at a point no one envisioned in 1965. The right to vote no longer means simply the right to enter a polling booth and pull the level. Yet the issue retains a simple Fifteen Amendment aura—and aura that is pure camouflage. An alleged voting rights violation today is a districting plan that contains nine majority-black districts when a tenth could be drawn. The question is: how much special protection from white competition are black candidates entitled to?"[151]

Thernstrom's passage argues two points of democratic structures. First, voting is a rational exercise of individual choice as exemplified by pulling the lever in a booth in a solitary fashion. Second, democratic structures do not reserve space for groups as that infringes upon the rights of the individual to make a choice between alternatives provided for them. Both of these arguments converge with he language of "redistribution" that Thenstrom employs, connecting to a consciousness of that which is unearned as the community takes from those individuals who are successful. Thernstrom writes that to ensure ballots fully count to protect groups, districts must be drawn to achieve success and "anything less suggests a compromised right. Yet maximum weight implies an entitlement to

[151] Abigail M. Thernstrom, *Whose Votes Count?* (1987), 4 - 5.

proportionate ethnic and racial representation— a concept that is no less controversial with respect to legislative bodies than with reference to schools and places of employment."[152] This argument exaggerates slightly as it overlooks the ability of a ballot to influence an election as Justice White suggests in *Whitcomb* v. *Chavis*. But the point here by Thernstrom is not to present a fair discussion of representation but to state that ballots either count or they don't; if the count they only count if they achieve representation and if any system guarantees representation, it denies the natural order.

Thernstrom's argument focuses on the natural talents of individuals in the political process, which democracy must protect as it is the space where elites separate themselves from commoners out of talent and will. When discussing the Court's change from *Whitcomb* v. *Chavis* to *White* v. *Regester*, Thernstrom notes that though districting decisions can affect outcomes for partisan, ethnic, or other groups, "none can promise every citizen equal power; inevitably, some individuals, like some other groups, will be better positioned and more skillful than others."[153] The logic of this ideological position reveals that systems of representation, and corrective legislation, which preserve political space for groups, deny the rights of individuals to affirm the natural order of human will and the development of human talent in society. In this view, politics concerns not institutional control but the battle of individual wills. Overlooking arguments about structure, she implies that those who do not succeed fail because of lack of talent or will.

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[152] Abigail M. Thernstrom, *Whose Votes Count?*,5 – 6.

[153] Abigail M. Thernstrom, *Whose Votes Count?*, 73.

Thernstrom writes that, "democratic choice and democratic institutions require fluidity and freedom that are at odds with the concept of labeling citizens for political purposes on the basis of ethnicity. They also require a sense of community," which labeling by ethnicity or race denies and at-large elections can build or foster.

Thernstrom presents the idealistic vision of a united, majoritarian democracy, which is constituted by the individual fulfilling the natural order. Yet, it is not an argument of principle supporting democracy as it fails to argue against other forms of "minority" representation that diminishes democracy, such as judicial review, the Senate, or a Presidential veto. It fails to consider the historical role of group representation in the U.S. in the original representational sin of the three-fifths clause. It does not consider other threats to "natural" democracy, such as partisan gerrymandering. Thernstrom's vision of democracy deflects away from the history and realities of race and the heresthetic nature of elections to shape debate. Concerning the Lani Guinier controversy, Mark Lawrence McPhail writes that Guinier's rejection rests of an image of democracy whereby people are of good will; citizens unite themselves in a common enterprise and live accordingly to a common consent.[154] McPhail writes that, "This is a vision of America in which the racial past no longer has any implications for the present, an American in which whites have already done everything that they could, in which the ball is in the other's court."[155] For Thernstrom, since the VRA accomplished its goal of prohibiting

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[154] Mark Lawrence McPhail, *The Rhetoric of Racism Revisited: Reparations or Separation?* (Lanham: Rowman & Littlefield press Publishers, Inc. 2002), 184.

[155] Mark Lawrence McPhail, *The Rhetoric of Racism Revisited,* 193.

practices that prevent people from registering and voting, the judicial enforcement after that point altered the meaning of the VRA to the point that it would guarantee representation for minorities.[156] History and minority rights have progressed; the future will not be like the past. Accordingly, for Thernstrom, the use of race becomes unwarranted.

Missing from Thernstrom's discussion and the decisions by the Conservative Justices is how attitudes about race change over time as race no longer matters to the rational individual. The historical discussion moves from official policies of discrimination to the advent of the VRA to the eradication of literacy tests and prohibitions on registrations to the development of political equality as administered by the states to the individual. In this transition, this ideological movement shifts the view of the federal judiciary and racial minorities, as they become the active agents in weakening political equality and destroying the liberty and sovereignty of state legislators to adopt effective policies of representation and representative government. The consequence of this position requires limiting the authority of the Court and preventing the power of groups to balkanize the American electorate by attacking the source of authority, the VRA. In *City of Rome*, Justice Rehnquist uses his dissenting opinion to challenge the constitutionality of the Supreme Court's interpretation of the VRA as the Court allows for Congress to exceed its authority of the states by prohibiting state legislators from enacting specific types

[156] Abigail M. Thernstrom, *Whose Votes Count?* 4.

of electoral structures that would be permissible under the Civil War Amendments.[157] Though Rehnquist could gain only one adherent in *City of Rome*, in just over a decade's time, the Supreme Court would begin its judicial flirtation with overturning certain aspects, if not the entirety, of the VRA.

In response to the Conservative plurality in *Mobile* v. *Borden*, Congress amended the VRA, allowing challengers to prove vote dilution claims by showing discriminatory effects rather than just discriminatory intent.[158] In a unanimous decision, the Supreme Court upheld challenges to the 1982 VRA amendments, resolved the tension in precedent between *Mobile* v. *Borden* and *Rogers* v. *Lodge*, and ruled that a North Carolina District Court reached the correct decision as it concluded that, under a totality of circumstances test, six multi-member districts diluted the rights of black citizens to participate in the political process and prevented them from electing representatives of their choice.[159]

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[157] *City of Rome* v. *United States*, 446 U.S. 156, 206 (1980). Justice Rehnquist's position relies on an intent test. Since there was no intent by the state legislators to discriminate against its citizens, then the state legislators possess the ability to enact the electoral structures it desires.

[158] *Thornburg* v. *Gingles*, 478 U.S. 30, 36 (1986). The newly amended portions of the VRA read: 2(a): No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b). 2(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." The last section is a point of controversy as it rejects the standard for establishing proportional representation of groups though it does not state that legislator cannot pursue it.

[159] *Thornburg* v. *Gingles*, 478 U.S. 30. 36 (1986). The semi-coherent "totality of circumstances" test developed in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (1973) as a response to Justice White's use of the phrase in his

Under this decision, racial minorities received an opportunity to challenge at-large and multimember districts if a group could provide evidence that, first, the group constituted a "sufficiently large and compact" to warrant a single-member district; second, it demonstrated political cohesion; and, third, racial block voting prevented the group's success.[160] Though the Conservative Justice may have accepted the change of the VRA and upheld them in *Gingles* because of Congressional action and authority, they also

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opinion in *White* v. *Regester*, 412 U.S. 755, 769 (1973). In *Mobile* v. *Borden,* a conservative plurality rejected the "totality of circumstances" guidelines to adopt a intent based test where challengers need to establish districts and electoral practices were racially motivated. In the 1982, the Senate Judiciary Report that accompanied the newly amended §2 noted the following circumstances or factors to help discuss the totality of circumstance test in §2(b)(a): "1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; 2. The extent to which voting in the elections of the state or political subdivision is racially polarized; 3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; 4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process; 5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; 6. Whether political campaigns have been characterized by overt or subtle racial appeals; 7. The extent to which members of the minority group have been elected to public office in the jurisdiction. "Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are: whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group. Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." Days after Congress amended the VRA, the Supreme Court released its decision in *Rodgers* v. *Lodge*, which relied upon an effects test.

[160] *Thornburg* v. *Gingles*, 478 U.S. 30, 36 (1986). In order to prove that multimember districts dilute the votes of a minority voting bloc, that voting bloc must, first, establish that the voting group is "sufficiently large and geographically compact" to constitute majority of voters in a single-member district; second, the minority group must show it is politically cohesive; and, third, white voters vote as a bloc to defeat minority candidates, 51 – 52. When considering the racial polarized voting, the reasons why the citizens voted for a candidate do not matter as much as the race of the voter and the selection of the candidate (63). The race of the candidate does not play a role in racial polarized voting. Instead, what matters is which candidate the minority parties supports and if the white majority opposes that candidate (68 – 69). Additionally, the plaintiffs do not have to establish any racial animosity on the part of the officials as to do so would be unnecessarily divisive as the plaintiffs would need to the majority of a community would be racist (72). Instead, the plaintiffs only need to establish a correlation between race of the voters and the selection of certain candidates to establish that racial bloc voting exists in an area (74).

accepted a competing vision of democracy that they would later challenge during the 1990s.

If the overall goal of the Supreme Court's reapportionment and redistricting cases concerns the development of the Democratic experience, with the value of political equality as a means to fulfill this goal, the Supreme Court's decision in *Thornburg* v. *Gingles*, returns the Court's jurisprudence closer towards that goal. In *Gingles*, Justice Brennan's opinion implicitly argues that the health of the U.S Democracy rests on developing participation in the political process even if the process contains pluralism and if it rests on groups possessing competing interests. When reviewing the facts, Justice Brennan notes that, by using the guidelines set out in the Senate Report, the District Court noted that black representatives of North Carolina faced official and unofficial forms of cultural, political, and social discrimination that prevented them from achieving political equality.[161] These circumstances suggest that in North Carolina blacks received representation only to the degree that whites spoke for them and the history of discrimination and the racially polarized voting suggests that the dominant majority did

[161] *Thornburg* v. *Gingles*, 478 U.S. 30, 36 - 42 (1986). First, North Carolina official discriminated against its black citizens through the use of poll taxes, literacy tests, and a prohibition against single-shot voting; second, historic discrimination in education, housing, and health services created disadvantages for black citizens; third, the use of a majority vote requirement for primary elections created an unnecessary impediment for the ability of black candidates to win elections and black constituents to elect representatives of choice; fourth, white candidates encouraged and relied upon overt and subtle racial appeals in campaigns; fifth, black candidates were disadvantaged in the relative probability of success while running for office and that success for black candidates, especially for statewide offices was low; and, sixth, the districts in question featured racially polarized voting. Additionally, in the oral arguments, Ralph Gingles argued that in the elections between 1978 – 1982, white did not vote for blacks 81% of the time in primaries, over 60% whites did not support a black candidate when nominated, and even when blacks were nominated by their party, whites form the party did not support the candidate. Further, because of low socio-economic status and the cost of running in multi-member districts, blacks faced an additional constraint while running for office. See *Thornburg* v. *Gingles*., No. 83-1968 4 December (1985).

not speak for the minority very often. While the official prohibitions such as poll or literacy tests were removed, the attitudes of the people who enacted those tests did not change when Congress prohibited them in the VRA.

Justice Brennan's decision in *Gingles* reflects a distrust that the legislative process would not protect the liberties of political minorities by limiting the ability of minorities to aggregate themselves with other individuals that share the same interests. While the majority always possesses this right in North Carolina, the minority, according to the development of partial and "unnatural" lines of the multi-member districts, found themselves without an ability to develop a sense of community unless they adopt the interests of the majority, a majority that has neglected them for centuries. Because of the electoral structure, whites would always out vote blacks in the multi-member districts.[162] According to Heather Gerken, the essence of the American representative system is the ability of individuals to "elect a person to speak on their behalf," and one of the most effective ways to accomplish this is through the use of compact districts which typically group like individuals together and allow for easier communication and representation between the representative and his or her constituents.[163] Consequently, vote dilution threatens the essence of the American system and threatens the ability of individuals to work together as a group and convey interests to which the representative ought to

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[162] Keith J. Bybee, *Mistaken Identity: The Supreme Court and the Politics of Minority Representation*, (Princeton: Princeton University Press, 1998), 121.

[163] Heather Gerken, "Understanding the Right to an Undiluted Vote," *Harvard Law Review* 114 (2001): 1678 – 1679.

adhere.[164] In multi-member districts that serve as the basis of *Gingles*, though the minority group could establish political equality if situated in a single-member district, the majority dominated the equality of the minority and failed to respond to their interests.

This group right to vote within *Gingles* represents the fulfillment of the One Person, One Vote standard by Justice William O. Douglas and Chief Justice Earl Warren. In *Wesberry* and *Reynolds*, the decisions by the Court ask state legislators to focus not on the physical act of casting a ballot but the expansive reading of examining the meaning of the ballot cast. By doing this, the Supreme Court sees the importance of voting in the process by ensuring that each person possesses the opportunity to compete in the political process.[165] As Lani Guinier notes, the transition from multi-member districts to single-member districts serves, first, as electoral means to elect black representatives and provide their constituents with a political voice; second, as a means to preserve black voters' status as citizen since the right to vote affirms citizenship status; and, third, as an instrumental means to increase participation in the political process and promote democratic values.[166] Though, as Guinier notes, while the majority may employ other tactics to deny political fairness while minorities possess equality,[167] the *Gingles* decision fosters democratic

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[164] Heather Gerken, "Understanding the Right to an Undiluted Vote," 1678.

[165] Heather Gerken, "Understanding the Right to an Undiluted Vote," 1731.

[166] Lani Guinier, "No Two Seats: The Elusive Quest for Political Equality," *Virginia Law Review* 77 (1991): 1428 – 1431.

[167] Lani Guinier, "No Two Seats: The Elusive Quest for Political Equality," 1435 - 1436. Guinier discusses other forms of discrimination by effect put in place and black citizens received representation such as agenda setting, denial of a meaningful legislative vote, and exclusion from deliberation.

empowerment within a community that historically lacked representation and opened the possibility of deliberation.

Elite Democracy, Partisan Entrenchment and the Loss of Deliberation

During the 1970s and 1980s, the Supreme Court heard oral arguments in five cases that concern the concept of political fairness in partisan reapportionment and redistricting plans.[168] Similar to the Reapportionment Revolution cases, the Supreme Court's decisions in the partisan redistricting rely on the concept of "political fairness" to discern what type of democracy should form the basis of the political system in the United States and what the Supreme Court's role ought to be in the American political system. Yet, unlike the decisions in the Reapportionment Revolution, the Supreme Court attempts to articulate a concept of "political fairness" in the midst of three rhetorical constraints. First, the Supreme Court must defend the rights of citizens to participate in the political process, cast a meaningful ballot, and receive effective representation against manipulation by the political parties in control of the legislative branches. Second, the Supreme Court must also adhere to the problem of the "political question" by deferring to the political branches and allowing state legislators the liberty to pursue rational state

[168] The five cases are *Ely* v. *Klahr*, 403 U.S. 108 (1971), *Gaffney v. Cummings*, 412 U.S. 772, *White* v. *Weiser*, 412 U.S. 783 (1973), *Karcher* v. *Daggett*, 462 U.S. 725 (1983), and *Davis* v. *Bandemer*, 478 U.S. 109 (1986). The decision for *Gaffney* v. *Cummings* (Connecticut State Legislative Reapportionment) and *White* v. *Weiser* (Texas Congressional Reapportionment) were handed down on June 18th, 1973, the same day the Supreme Court handed down *White* v. *Regester*, 412 U.S. 755 (1973 (Texas State Legislative Reapportionment), which protected minority voting blocs in Texas and allowed for a 10% population deviation standard for state legislative apportionment. Ideologically, the decisions were: *Ely v. Klahr*, 9 – 0 opinion by Justice White; *White* v. *Regester*, 6 – 3 opinion by Justice White; who was joined by the Conservative Justices; Gaffney v. Cummings, 6 – 3 decision by Justice White, who was joined by the Conservative Justices; *Karcher* v. *Daggett,* a 5 – 4 decision by Justice Brennan, with Justice Stevens writing the controlling concurrence; *Davis* v. *Bandemer,* a 6 - 3 plurality opinion by Justice White, with support from Justices Brennan, Marshall, Blackmun, Powell, and Stevens.

objectives that benefits the citizens of a state, though in this pursuit, some citizens may receive more benefits than others and one party may receive more benefits than others. Third, unlike the cases that involve the VRA or racial gerrymandering, the Supreme Court must act without the mandates of Congressional or Constitutional authority and to pursue decisions that may in fact alter the relationship between the elected and the represented, but also the composition of the state legislatures and of Congress. This occurs without any clear and discernable standard of how to judge when partisan interests seek to disrupt the political process and diminish the political fairness of citizens.

Like the VRA and vote dilution cases, the meaning of the democracy not only concerns the institutionalization of representation but the proper role of the Supreme Court in relation to the political branches and the American people. In case after case, the Supreme Court debates the proper interpretation of *Colegrove*, *Gomillion*, *Baker*, *Wesberry*, and *Reynolds* as the Supreme Court discuss the reconciliation between group and individual rights, between the boundaries of the legal and political. By casting a vote, citizens form themselves into an identifiable voting bloc and the mistreatment of the group, especially if it occurs before the election occurs in the reapportionment and redistricting process, becomes analogous to the meaning *Gomillion*. In *Karcher*, Justice Stevens, who provided the swing vote in the case, writes that the basis for a gerrymandering claim develops form the ethical reading of *Gomillion*: the judiciary ought to find a reapportionment or redistricting plan unconstitutional if the state dilutes the

voting strength of a cognizable political or racial group.[169] Conversely, the desire to return the authority of representation, especially when considering the rights of political parties to tame the nature of democracy, some justices desire to redefine the right to vote as a political or social right and not a fundamental right. The judiciary's authority, consequently, depends on its restraint from interfering with power of the political parties to enable the political process. Effective representation concerns the ability of the political parties and the state, and not just the states, to represent the people and determine the health of the body politic. The ideological fight over the best form of democracy concerns the integration and institutionalization of political fairness into the country's democratic structures.

Political Fairness and Elite Democracy: The Sisyphean Task of the Judiciary

In *The Law As It Could Be*, Owen Fiss writes that during the Burger and Rehnquist Courts, the Civic Republicans on the Court, express their disenchantment with the role of the Supreme Court, turning their backs on the judiciary and "placing their trust in the more political agencies, including Congress, to give specific content to our public values."[170] For the Rehnquist Court, the Chief Justice's ideological commitment to legislative Supremacy reveals his commitment to his Federalism Revolution.[171] For the reapportionment decisions, a commitment to federalism would mean the Supreme Court

[169] *Karcher v. Daggett*, 462 U.S. 725, 749 (1983).

[170] Owen Fiss, *The Law As It Could Be*, (New York: New York University Press, 2003), X.

[171] For a discussion of the Rehnquist Court and federalism, see Mark Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law*, (New York: W.W. Norton & Company, 2006), 249 – 278.

would need to diminish its own authority to in its jurisprudence. While the Liberal Justices on the Supreme Court reflect a distrust of the legislative process, especially the way in which the legislative process may exclude the voices of all citizens, the Conservative Justices on the Supreme Court reflect a pessimism about the nature of democracy, especially concerning the ability of the people to administer that democracy and the ability of the judiciary to discern sound policy.

Because of the need for competence, the Conservative justices allow those with expertise, e.g. state legislators and the political parties, to necessary political authority to govern, even if that governing means that voting no longer exists as a "fundamental right" in society. Richard H. Pildes writes:

> To ensure "political stability" and avoid "ruinous competition," American democracy required regular organizations, a highly ordered two-party system, a style of politics that was channeled and contained, lest too much politics undermines democracy itself. Perhaps it also required, or came to be seen as requiring, an active judicial role to ensure that too much democratically-adopted restructuring did not undermine the stability of democracy itself.[172]

The Conservative position in the reapportionment decisions fears political disorder, which occurs when apportionment plans limit the power of political elites to apportion to their discretion. Too much politics or too competitive a system, Pildes writes "will bring

[172] Richard H. Pildes, "*Bush* v. *Gore*: Democracy and Disorder," 717.

instability, fragmentation, and disorder."[173] For the Conservative Justices, opening up the political process threatens political stability, even if it is to open the process up to the average citizens. Consequently, the rhetorical strategy for the Conservative Justices to argues that the success of democracy depends on judicial absence in the political process.

In *Gaffney* v. *Cummings*, a majority of the Court held that small population deviations for state legislative apportionment plans were constitution, setting a de minims standard of 10% and returning some discretion to the state legislators by diminishing the regulations of the Supreme Court. Yet, more importantly, the opinion invents a new standard of political fairness for the country's democratic structures as the decision concludes that districts could provide a way to preserve competing voices within a state but so long that the state legislators possess the authority to create the "political fairness." According to Justice White, "The very essence of districting is to produce a different—a more politically fair— result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats."[174] Yet, the best way to create the fairest plan is to allow the major parties, working through the state legislators, to use the most informative data available to create as many safe districts as possible for each party "as the demographics and predicted political characteristics of the State would permit,"[175] even though it would deny the minority in those districts "any realistic chance to elect

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[173] Richard H. Pildes, "*Bush* v. *Gore*: Democracy and Disorder," 717.

[174] *Gaffney* v. *Cummings*, 412 U.S. 735, 753 (1973).

[175] *Gaffney* v. *Cummings*, 412 U.S. 735, 753 (1973).

their own representatives."[176] While promoting political stability between the political parties and the authority of the state legislators, the decision perpetuates virtual representation for many of the voters For those that support the losing candidate in a district, those voters would need to move to receive the representation they desired, change their ideological preferences, rely on "representation" from other districts, protest by abstention, or vote in protest. As long as the parties involved in the process follow the goals of equal population, then the Supreme Court will allow the state legislators to pursue rational objections: "judicial interest should be at its lowest ebb when a State purports to fairly allocate political power to the parties in accordance with their voting strength and, with quite tolerable limits, succeeds in doing so."[177]

Since the Conservative Justices were unable to form a majority in *Karcher* and *Davis*, their enacted a strategy to diminish the authority of the judiciary to act in the Democratic process. Employing a futility thesis, the Conservative Justices advance a position that further involvement into democratic politics will destroy the essence and stability of the country's political institutions.[178] In *Karcher*, the Conservative Justices of the Chief Justice and Justices White, Powell, and Rehnquist, were unable to extend a de minimis standard for Congressional districts and perverse the discretion of state

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[176] *Davis* v. *Bandemer*, 478 U.S. 109, 131 (1986).

[177] *Gaffney* v. *Cummings*, 412 U.S. 735, 754 (1973).

[178] Albert O. Hirschman, *The Rhetoric of Reaction*, (Cambridge: Belknap Press, 1991), 7. According to Hirschman, the futility thesis argues that the "cost of the proposed change or reform is too high as it endangers some previous, precious accomplishment."

legislators. In stating their opposition, the Justices not only argued the position was incorrect but offered one of the few challenges to reapportionment itself.[179] For the dissenters, the population deviations are "statistically insignificant," especially in regards of the deficiencies of the census and the changes in population within and between districts and states after the census occurs, meaning that the Supreme Court ought to adhere to a de minimis standard and allow the state legislators to forgo answering for the small deviation.[180] According to Justice White, as long as the state legislators seek a legitimate purpose and following some of the basic requirements to allow political fairness, such as "maintaining compact, contiguous districts, the respecting of political subdivisions, and efforts to achieve political fairness,"[181] the judiciary ought to adhere to a limited ethos of judicial minimalism and allow the organic political process to work itself out between the voters and the state legislature.

The judiciary's extended involvement into reapportionment, especially partisan reapportionment, ends up as being as a Sisyphean task: since it cannot prevent the state legislators from incorporating some political elements in their reapportionment plan, the judiciary will not be able to provide citizens with "effective representation" as state

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[179] Besides Chief Justice Burger's opinion in *Davis* v. *Bandemer*, where he just offered Justice Frankfurter's warning against the Supreme Court's involvement into reapportionment, the Justices on the Supreme Court had not challenged the reapportionment decisions since Justice Harlan left the Supreme Court.

[180] *Karcher* v. *Daggett*, 462 U.S. 725, 769 - 773 (1983).

[181] *Karcher* v. *Daggett*, 462 U.S. 725, 782 (1983). Justice White notes that cases with deviations below 5% that possess extraordinary circumstances may warrant judicial intervention and that some cases that possess greater deviations, though the legislators possess rational state objectives quoted above, may result in judicial abstention.

legislators can manipulate the One Person, One Vote rule to prevent effective and meaningful representation, unless that representation is authorization.[182] Consequently, the judiciary's involvement into reapportionment, especially with cases that concern minor deviations, will lead only to an increased judicial involvement. Micromanaging the ability of the state legislator to conduct reapportionment disregards the state legislative process and will only lead to an increase of the judiciary's docket. By focusing on the minor issues, the Supreme Court will not develop a principle to settle these issues and will only increase it interference in the political process. As the Supreme Court settles one case, it will need to start anew and push another rock up the hill. Further, the dissenting opinion in *Karcher* serves as a warning to the majority: if you attempt to proceed further into the political thicket, the conservative justices will no longer provide the rhetorical rope to find your way out and, eventually, once the dissenters become the majority, the new majority on the Court will cut the rope entirely, returning all representation back into the discretion of state legislators.

In *Davis*, Justice O'Connor's argument for judicial abstinence in partisan redistricting rests on the acceptance of the futility thesis to prevent the judiciary from seizing control of the democratic process. For Justice O'Connor, the issue before the Supreme Court involves the authority of the judiciary and the best way to develop a democratic process. As Justice O'Connor notes, the facts of *Davis* rest on a "perceived injustice" and the best and only remedy is to "place responsibility for correction of such

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[182] *Karcher* v. *Daggett*, 462 U.S. 725, 775 - 777 (1983).

flaws in the people, relying on them to influence their elected representatives."[183] For the former legislator, the Supreme Court lacks the inherent judicial authority to decide partisan reapportionment cases, leaving the issue to be determined by the political parties and the people, acting through the political parties. Justice O'Connor objects to the idea that the judiciary can employ the "Equal Protection Clause as the vehicle for making a fundamental policy choice [about how this Nation should be governed] that is contrary to the intent of its Framer's and to the traditions of this Republic."[184] Though Justice O'Connor displays vehemence on this point, she provides nothing except a self-evident claim that the Founding Fathers would reject the ability of the judiciary to limit the legislative branch and prevent the political parties in providing stability. While Justice O'Connor may be correct that the Founders may not have wanted the judiciary to decide these questions, she overlooks the disdain some of the Founding Fathers possessed with political parties. Though there is too much conflicting evidence to reach consensus, the idealized version of our founders would reject the power of political parties, as George Washington did in his Farewell Address, while rejecting the notion that the judiciary, though partisan, would enter the political arena.

Second, according to Justice O'Connor, the judiciary lacks the authority to decide these cases since nothing in the Supreme Court's precedents suggests that the Supreme Court ought to act in this area of election law. Rather than to extend the Supreme Court's authority and, consequently, weaken it, the dissenters would prefer that the judiciary

[183] *Davis* v. *Bandemer*, 478 U.S. 109, 144 (1986).

[184] *Davis* v. *Bandemer*, 478 U.S. 109, 158 (1986).

displays prudence and caution while rejecting the temptation to transform reapportionment into proportional representation. The meaning of *Baker* and *Reynolds*, according to Justice O'Connor, is that the right to vote is an individual right and that vote dilution occurs only when equality is not present for the voters in the districts.[185] If the judiciary were to enter the debate over partisan gerrymandering, then it would need to take control of the entire process to ensure fairness at the state-wide level and enact proportional level throughout the country. Consequently, this approach would be flawed from the onset since the Equal Protection Clause does not provide "judiciable manageable standards for solving purely political gerrymandering claims, and no group right to an equal share of political power."[186]

Additionally, proportional representation is to be rejected as politics in the United States concerns compromise between two parties. In *Gingles*, Justice O'Connor's decision rests on the premise that compromise is essential to federal legislation.[187] In this view of government, democracy must have its limits or else it would limit the authority and efficacy of the state legislature. Consequently, Justice O'Connor believes that the Supreme Court employs *Gingles* to push too far toward proportional representation, which limits the authority of the state legislature. A representative body that is proportional guarantees

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[185] *Davis* v. *Bandemer*, 478 U.S. 109, 149 – 150, (1986).

[186] *Davis* v. *Bandemer*, 478 U.S. 109, 147 (1986). In Justice O'Connor's opinion, the Founding fathers did not intend for groups to have an equal share of political power though, as discussed earlier, In *Dred Scott and the Problem of Constitutional Evil* Mark A. Graber suggests that the Founders expected some level of consensus between interests in the North and South. See Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge: Cambridge University Press, 2006).

[187] *Thornburg* v. *Gingles*, 478 U.S. 30, 106 (1986).

the composition of a political body and diminishes the opportunity for electoral compromises and coalitions. By creating a mirror of the electorate, proportional representation overrides the liberty and discretion of the state legislators to pursue an electoral strategy that offers voters mainstream alternatives. By reading *Davis* and *Gingles* together, Justice O'Connor's opposition to proportional representation serves as a threat to the political parties that form the foundation and stability of the American Republic. If there were a diminishing of minority voices as a consequence of rejecting proportional representation, it appears that Justice O'Connor would accept this trade-off especially if it were still possible for racial minority groups to bring forth some challenges to vote dilution.

To accept this position means that "political equality" does not lead to better representation for the citizens, especially since political parties can control the state and reapportionment. Since the standards of *Wesberry* and *Reynolds* are malleable enough, political parties can prevent the citizens from receiving "effective representation" if they choose. In *Davis*, Justice O'Connor sees partisan gerrymandering as a "self-limiting enterprise," and argues that if the political parties attempt to create too many safe districts then they take the risk of diluting their political strengths; once they attempt to pick up too many seats beyond their perceived strength, the party will create competitive districts that the party in control may lose or they will dilute the strength of their safe seats.[188] The vice of this institutional system is the accountability may never develop through elections

[188] *Davis* v. *Bandemer*, 478 U.S. 109, 152 (1986).

since the political parties can minimize their losses and pack the opposition into districts. However, since stability and not competition is the most important value in Justice O'Connor's vision of democracy, then it is best for the political parties in a state to create as many districts above the competition threshold, which according to *UJO* exits above 55%. In a stable, two-party system achieving this is an easier task as there are fewer demographic points of data to consider. Additionally, the need for democratic debate lessons as does the need for an informed electorate; however, according to this view of democracy, stability ensues.

Further, even if the Supreme Court were to enter fully the political thicket, it would not possess the authority to condemn the worst cases of ineffective representation. Hidden beneath the vote dilution, §5, apportionment, and partisan gerrymandering claims, reside other forms of representational vices leaving citizens with no recourse as the judiciary defers in these areas to the discretion of state legislators. When establishing interpretative dominance in the early partisan cases such as *White v. Weiser* and *Gaffney v. Cummings* and invoking representation as authorization, the majority of the Court allows democratic structures to contain certain vices that threaten the effectiveness of representation. In *White* v. *Weiser*, Justice White sates that as long as the states followed the first priority of political equality, it would not disparage the state's ability to preserve "constituency-representative relations" or diminish the ability of the state to protect its seniority in the House of Representatives.[189] The lack of competitiveness in elections,

[189] *White* v. *Weiser*, 412 U.S. 783, 791 (1973).

Justice White remarked, failed to present a sign of invidious discrimination against citizens that would warrant judicial action **even if the lack of electoral competition diminishes civic participation**. While safe districts allow for the protection of political subdivisions and allows for legislators to identify important social structures,[190] and combining competing interests leads to fragmentation,[191] too much protection e.g. Gaffney, allows political collusion and diminishes any need for deliberation.[192] Further, creating safe districts for incumbents, who already possess an advantage in money and name recognition, legislators invent the "will of the people" that favors specific representative.[193] Even the Liberal Justices may not desire to interfere in these gray areas, meaning that judicial activism is quite fruitless.

Justice O'Connor's decision to focus her attacks on the Supreme Court's authority serves as a means to position the strength of the political process on the shoulders of the political parties rather than the judiciary, the citizens, or the state. In Justice O'Connor view, the country's "sound and effective government" develops from the stability of the two-party system:

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[190] Richard Morrill, "A Geographer's Perspective," in *Political Gerrymandering and the Courts*, ed. Bernard Grofman, (New York: Agathon Press, 1990), 215.

[191] Bruce Cain, "Perspectives on *Davis v. Bandemer*: Views of the Practioner, Theorist, and Reformer," in *Political Gerrymandering and the Courts*, ed. Bernard Grofman. (New York: Agathon Press, 1990), 133.

[192] Samuel Issacharoff, "Gerrymandering and Political Cartels," *Harvard Law Review* 116 (2002): 600.

[193] Kristen Silverberg, "The Illegitimacy of the Incumbent Gerrymandering," *Texas Law Review* 74 (1996): 920.

> The preservation and health of our political institutions, state and federal, depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change. The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States, and one that plays no small role in fostering active participation in the political parties at every level. Thus, the legislative business of apportionment has been carried out—by the very parties that are responsible for this process—present a political question in the truest sense of the term.[194]

For Justice O'Connor, the health of the democratic system rests on the political parties to provide for the American people rather that an informed electoral "searing the consciousness" of the representatives. The political parties, and not just the elected representatives, act as the filter for the political process, bringing about the stability and change within American society. For the Judiciary to extend its authority over partisan redistricting would mean that the judiciary would be the branch of government to determine the health of the democracy but also into one of the "most heated partisan issues."

Theoretically, in her vision of democracy, the people act as a corrective agent in the democratic process, even if Justice O'Connor doubts their ability to do so. According to Jeffrey Tubin in *The Nine*, Justice O'Connor is, at times, hostile to the people, as

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[194] *Davis* v. *Bandemer*, 478 U.S. 109, 144 - 145 (1986).

exemplified during *Bush* v. *Gore*, in which she believed that the real issue involved concerned the ignorance of the people in not know how to cast their ballot; further, it was not the role of the judiciary to make that decision for them.[195] This view carries over to reapportionment as she places presumption for the democratic process with the political parties. Consequently, instead of basing the right to vote on the traditional social qualities such as wealth or property, the right to vote and the meaning of that vote depends to some degree on affiliation with a political party.

As Justice O'Connor defines the political parties and the keepers of the democratic tradition, she diminishes the vigilance of the people. In her argument, O'Connor leaves her readers with a choice between the control of reapportionment by the judiciary, leading to an unhealthy democracy, or, control by the political parties, which upholds the health of the democracy. The people, according to this view, follow the choices of the political parties as democracy is best left to the political elites. But this view of the political process does not require the active participation in self-government, just the ability of the individuals to pull the level or touch the screen. While some people may act rationally, while others emotionally, active participation and sound deliberation are not necessary or sufficient to an elite conception of democracy. Instead, democracy requires that people authorize legislators to conduct the process. As the parties try to enact legislation and gain support for their policies, they may win or the may fail; however, this is a decision for to the people, the people's representatives, and not the Courts. Even

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[195] Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme* Court, (New York: Doubleday, 2007), 166. Toobin notes that Florida law did, in fact, require vote counters to determine the meaning of the vote.

though the dominant political power may attempt to alter the debate in its favor by packing its adherents and isolating or minimizing dissent, the voters may choose to support the opposition, which undercuts the evidence that voters vote consistently for a group and, hence, counters a group right to vote. Passionate, or wealthy, citizens will run for office; apathetic citizens may vote for those who run. Some of these who register and vote may join a party; other may remain independents, enhancing elections and increasing a party's voting strength.[196] Accordingly, if political parties want to engage in a process where they arrange districts to their advantage, then Justice O'Connor would allow this opportunity to influence the election since it is the nature of the electoral system and the political process. If equality is the standard, then the system will work itself out; if fairness it the standard, the foundation of democracy crumbles.

Public Reason and the Political Process: Sustaining Democracy

While the Conservatives Justices on the Court argued to return redistricting to the legislative branches, the liberals and moderates exemplified the argument that a political standard of fairness could be found, possibly. Additionally, the argument for judicial involvement served as a way to protect the authority and ethos of the judiciary, especially in relation to the judge as the protector of constitutional rights, and nature the development of democracy by enhancing civic participation.

While the majority's decision in *Karcher* focuses its decision upon procedural grounds in an attempt to for state legislatures to achieve the most effective

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[196] *Davis* v. *Bandemer*, 478 U.S. 109, 160 (1986).

reapportionment plans possible, the larger issue in which Justice Brennan discusses is the role of the judiciary in American Law. While noting that the "One Person, One Vote" rule in *Wesberry* and *Reynolds* is the ideal for state legislators and the Article 1, 2 allows only for deviations that are "unavoidable despite a good-faith effort to achieve equality," the majority attempts to make *Karcher* about how to determine a violation.[197] Under *Karcher*, challengers of a plan possess the burden of proof to show why the population variations could have been reduced or avoided and, if they are successful, then the state legislators must show why the variations ought to stand and that the deviations are significant to pursue a legitimate legislative goal.[198]

However, even though the majority focuses on procedural, one of their motivations in *Karcher* to protect judicial authority. While the majority notes that population is the ideal, Justice Brennan refuses to allow state legislators to follow any standard less than the ideal to preserve the proper order of government. Throughout its history in reapportionment, Justice Brennan desired not to abandon the authority of the court, especially since if the Supreme Court abandons its authority in one case, there would be precedent for it to abandon authority it other areas of Constitutional law. During the Burger Court, Justice Brennan began to loathe the conservative treatment of reapportionment, especially during the unstated cutback of political equality as the Supreme Court allowed for deviation to equality in *Mahan* v. *Howell*, which nearly brought Justice Brennan to tears, and development of a "secret internal rule of thumb," allowing

[197] *Karcher* v. *Daggett*, 462 U.S. 725, 731 (1983).

[198] *Karcher* v. *Daggett*, 462 U.S. 725, 731 (1983).

for 10% - 20% deviation and the ability of local politicians to redraw districts to ensure reelection.[199] As the defender of the Warren Court, Justice Brennan felt the actions of the Burger Court threatened the political equality of citizens. Ten years after *Mahan* v. *Howell*, Justice Brennan relied on *Karcher* for a legal defense of the Warren Court for if the Burger Court possessed the authority to alter its stance on political equality in *Karcher*, then the Supreme Court could alter Justice Brennan's decision in *Baker*, removing the Supreme Court from the apportionment cases but not necessarily the VRA cases.

This argument on the Supreme Court's authority becomes relevant since two years after the *Karcher* decision, President Ronald Reagan's Attorney General Edwin Meece would engage in a public debate with Justice William Brennan over constitutional interpretation and the role of the Supreme Court in public life, especially as it relates to the Rights Revolution. In this public debate over the Constitution and the role of the judiciary, Justice Brennan feared that the Reagan Administration would roll back the advancement of rights. Speaking for the Reagan Administration, Edwin Meese argued that the Supreme Court needed to follow a jurisprudence of original intention to diminish the power of the Supreme Court and returning the process constitutional decision-making to the political branches at the state and local level.[200] By making this argument, the Reagan administration hoped to alter the political battle during the next Supreme Court

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[199] Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court*, (New York: Simon & Schuster Paperbacks, 1979), 328.

[200] Edwin Meese, "Interpreting the Constitution," in *Interpreting the Constitution: The Debate over Original Intent* ed. Jack Rakove (Boston: Northeastern University Press, 1990), 16 – 21.

nomination process as the administration sought to appoint justices that followed this philosophy, such as Robert Bork.[201] Justice Brennan countered that Meece's philosophy of original intention was nothing more than "arrogance cloaked as humility," and that the roll back that the Reagan administration desired would deny the advancement of law during Justice Brennan's tenure on the Supreme Court.[202] While Justice Brennan's decision notes that reapportionment is a political process and that the state legislators possess the liberty to pursue secondary goals through reapportionment, Justice Brennan is unwilling to relinquish the role of the Supreme Court in American Public Life.

While ideological forces desired the Supreme Court to commit to Civic Republicanism, the Liberal Justices provided the public with a model of reasoned debate even by attempting to discern standards to judge partisan apportionment cases, the most political of the reapportionment and redistricting decisions. In *Davis*, Justice White and Justice Stevens focus their concerns on the ability of the voter to engage in the political process and to create as many associations and employ as many strategies of identification as possible. In "Gerrymandering as Political Caterls," Samuel Issacharoff argues that partisan gerrymandering is more lethal to the health of the democracy, especially when the parties attempt to monopolize the democratic process.[203] To remedy the collusion, there

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[201] Jack Rakove, "Introduction," in *Interpreting the Constitution: The Debate over Original Intent* ed. Jack Rakove (Boston: Northeastern University Press, 1990), 3 – 4.

[202] William J. Brennan, Jr. "The Constitution of the United States: Contemporary Ratification," in *Interpreting the Constitution: The Debate over Original Intent* ed. Jack Rakove (Boston: Northeastern University Press, 1990), 23 – 34.

[203] Samuel Issacharoff, "Gerrymandering and Political Cartels," *Harvard Law Review* 116 (2002): 598 - 600.

needs to be a better discussion and implementation of the political process, which occurs in the partisan gerrymandering cases as the Supreme Court debates how to improve districting. According to Richard Morrill, representation is both territorial and ideological, "and that *meaningfulness* of electoral districts to the voters matters. Electoral districts are not merely passing conveniences for the holding of elections, but entities with which citizens identify."[204]

In *Davis*, the plurality's decision serves as the middle-ground position, between government neutrality on one hand and judicial withdrawal abstinence in the political process on the other. Based on the language of vote dilution claims, to reach a conclusion of an unconstitutional political gerrymandering, Justice White states that the justices ought to examine the intent of the state legislature and the effects of the redistricting plan together, rather than separately, as Justice Powell would.[205] Partisan gerrymander, according to the plurality's decision, is similar to other types of vote dilution cases, such as inequality, the use of multi-member districts, and racial vote dilution.[206] In declining to

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[204] Richard Morrill, "A Geographer's Perspective," 238. Morrill believes that the proper way to judge fair and effective representation is to examine the system-wide structure and the district level composition through multiple criteria, such as partisan effect, competitiveness, community of interest, political unit integrity, and compactness.

[205] *Davis* v. *Bandemer*, 478 U.S. 109, 141 (1986). Justice White writes, "The equal protection argument would proceed along the following lines: If there were a discriminatory effect and a discriminatory intent, then the legislation would be examined for valid underpinnings. Thus, evidence of exclusive legislative process and deliberate drawing of district lines in accordance with accepted gerrymandering principles would be relevant to intent, and evidence of valid and invalid configuration would be relevant to whether the districting plan met legitimate state interests."

[206] *Davis* v. *Bandemer*, 478 U.S. 109 (1986). Samuel Issacharoff argues that through regression analysis that considered the comparison of racial composition of all electoral precincts in a jurisdiction and the extent to which racial minorities could vote for a particular candidate, social scientists could develop a accurate working model for racial vote dilution. However, because of the instability in the definition of Democrat

hold that political gerrymanders are never justiciable,[207] Justice White creates an ethos whereby the Court demonstrates its role as a defender of individual rights, minority rights and of procedural justice whereby the judiciary will step in to relieve that John Hart Ely would call "unblocking stoppages in the democratic process."[208]

In this vision of government, democracy works if the process works. While democracy constitutes an important mix of partisan politics and citizen activism, political elites cannot limit the ability of political reform and should not manufacture consent. Bernard Grofman writes that the Supreme Court's decision in *Davis* provides a necessary balancing act between the judiciary and the legislative branches as the decision needs to set a standard whereby the requirements would be high enough to discourage the most frivolous lawsuits on the matter but low enough to so the judiciary could strike down the most egregious and partisan redistricting plans.[209] While Justice White's decision nullifies some discretion of the state legislatures though this does not mean a "political question" is present as a difference exists between the relationship between coordinate branches of government and the discretion of the political parties. The first is not justiciable while the

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and Republican, split-ticket voting, and the inability to derive stale census block voting similar to racial data, social scientists have been unable to develop accurate models of partisan vote dilution. See Samuel Issacharoff, "Gerrymandering and Political Cartels," 603.

[207] *Davis* v. *Bandemer*, 478 U.S. 109, 124 (1986).

[208] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, (Cambridge: Harvard University Press, 1980), 117.

[209] Bernard Grofman, "Toward a Coherent Theory of Gerrymandering: *Bandemer* and *Thornburg*," *Political Gerrymandering and The Courts*, ed. Bernard Grofman. (New York: Agathon Press, 1990), 31. Grofman writes that in Davis Justice White's test is (1) intentional, (2) severe, and (3) predictably nontransient in its effects.

second may be since, implicitly, the political parties via state legislatures cannot diminish the fundamental rights of citizens, or, as Justice White states, "the claim is that each political group in a State should have the same chance to elect representatives of its choice as any other political group."[210]

For Justice White, democracy concerns accountability and the elected representatives must be accountable to a popular choice by the people. Yet, there is no standard of how that decisions ought to exist as he states that just because a party's prospects for winning an election have been diminished by a party does not mean that the party will be disadvantaged at the polls.[211] Samuel Issacharof states that the connection between accountability and elections concerns the allocation of political power and control of the political institutions: "the inability of a majority to prevail electorally does not simply compromise the integrity of any particular election result. It also skews the incentive structures operating to ensure the accountability of elected representatives to shifts in the preferences of the electorate."[212] But the problem for Justice White's decision is that he rests his test for partisan gerrymandering on intent and effects.[213] However, the

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[210] *Davis* v. *Bandemer*, 478 U.S. 109, 124 (1986).

[211] *Davis* v. *Bandemer*, 478 U.S. 109, 139 (1986).

[212] Samuel Issacharoff, "Gerrymandering and Political Cartels," 606.

[213] *Davis* v. *Bandemer*, 478 U.S. 109, 141 (1986). Justice White writes, "The equal protection argument would proceed along the following lines: If there were a discriminatory effect and a discriminatory intent, then the legislation would be examined for valid underpinnings. Thus, evidence of exclusive legislative process and deliberate drawing of district lines in accordance with accepted gerrymandering principles would be relevant to intent, and evidence of valid and invalid configuration would be relevant to whether the districting plan met legitimate state interests."

intent of one party to diminish the power of the other party always exists; for effects, Justice White argues that a political group has been shut out of the process for a long period of time, which could not be established for the two major parties, and, consequently, there could be no valid evidence. This decision leads to a judicial trap: how much is too much? Or, how much partisanship is too much partisanship for the redistricting process. When connected with the other factors of running an election, such as the candidate, the quality of the candidate, enthusiasm for candidate, the issues, money raised, advertising, etc., there is little action the court can take to determine a way to separate out these factors after the election occurs.

The failure of *Davis* concerns the failure to develop judiciable manageable standards and, hence, the failure of the Supreme Court to develop a conceptual view on how democracy works and an appropriate ethos to referee the political process. The Court's statement on partisan redistricts reads similarly to the position the Supreme Court provided in Baker, without the necessary rules developed in *Westberry* and *Reynolds* to provide good reasons to decided partisan reapportionment cases. Yet, this is an important difference because, by neglecting develop standards, the Supreme Court neglects to define the scope of the problem, i.e. what constitutes partisan discrimination against the Equal Protection Clause.[214] Consequently, without a clearly defined problem, *Davis* leads to

[214] Daniel Hays Lowenstein, "Bandemers' Gap: Gerrymandering and Equal Protection," in *Political Gerrymandering and The Courts*, ed. Bernard Grofman. (New York: Agathon Press, 1990), 79.

another failure as it lacks necessary "rule of five" to provide a strong and binding majority precedent.[215]

In his concurring opinion, Justice Stevens sought to achieve adherence for the view that the government, as an entity, must govern impartially towards all of its citizens and "serve the interests of the entire community."[216] In *Karcher*, and *Davis*, he writes that the basis for a gerrymandering claim develops form the ethical reading of *Gomillion*: the judiciary ought to find a reapportionment or redistricting plan unconstitutional if the state dilutes the voting strength of a cognizable political or racial group.[217] By casting a vote, citizens form themselves into an identifiable voting bloc and the mistreatment of the group, especially before the election occurs in the reapportionment and redistricting process, becomes analogous to the meaning and effect of *Gomillion*. When the state government interferes with the right to vote by adopting a redistricting plan that, "serves no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular time, or to disadvantage a politically weak segment of the community," there is a violation of the Equal Protection Clause.[218]

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[215] Bernard Grofman, "Unresolved Issues in Partisan gerrymandering Litigation," *Political Gerrymandering and The Courts*, ed. Bernard Grofman. (New York: Agathon Press, 1990), 3.

[216] *Karcher* v. *Daggett*, 462 U.S. 725, 748 (1983).

[217] *Karcher v. Daggett*, 462 U.S. 725, 749 (1983).

[218] *Karcher v. Daggett*, 462 U.S. 725, 748 (1983).

The opinion by Justice Stevens provides a better approach to discussing reapportionment in terms of communicative democracy. When the judiciary must interpret the meaning of the Equal Protection Clause, is must also be impartial to the needs of the state and to the citizens. Unless the judiciary is to avoid standards it sets for the other segments of society, it must be blind to the myriad numbers of identifications a citizen can possess. According to Stevens, "There is only one Equal Protection Clause. Since the Clause does not make some groups of citizens more equal than others, its protection against vote dilution cannot be confined to racial groups.... In the line drawing process, racial, religious, ethnic, and economic gerrymanders are all species of gerrymanders."[219] When a political group that possesses enough power at the polls to warrant an electoral victory becomes divided by the state or another political group in control of the state, that group forces the state to explain why they thought the drawing of district lines would probably result in the diminished political power of the group that disagrees or opposes the state.[220] However, unless there is discrimination against a group, the judiciary cannot provide political power and access to the state because it does not possess power in proportion to its numbers.

This view of the electoral process assumes the fluidity of group identification. Group identity does not concern just race or just partisan interests, but the identity of the citizen concerns multiple forms of associations and identifications. "Groups of every

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[219] *Karcher* v. *Daggert*, 462 U.S. 725, 750 (1983).

[220] *Mobile* v. *Bolden*, 446 U.S. 55, 87 (1980).

character," Justice Stevens writes, "may associate together to achieve legitimate common goals. If they voluntarily identify themselves by a common interest in a specific issue, by a common ethnic heritage, by a common religious belief, or by their race, that characteristic assumes significance as the bond that gives the group cohesion and political strength."[221] Institutional fairness requires that institutions allow individuals the ability to discern for themselves what identifications they desire. As Robert Ivy writes, "by maintaining a productive tension between cooperation and competition and not privileging any single perspective to the exclusion of all other, 'rowdy' rhetorical deliberation increases the potential of preventing adversaries from being transformed into scapegoats and enemies."[222] Conversely, institutions threaten fairness when they exclude groups and diminish the ability of citizens to decide for them what identification they prefer.

For Justice Stevens, the remedy for the divisive politics that attempts to exclude groups form the political process is the integration of competing factions with the hope that the differences and the consciousness of those differences will disappear as representatives focus on the commonalities of all citizens. For government to be self-correcting, then the government must ensure its citizens that when they vote, the decisions of government develop from the voice of the people. Concerning himself with the rights of citizens, seemingly to uphold the notion that the right to vote is a fundamental right within society, the consequence of this position is that the government is a relation

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[221] *Rogers* v. *Lodge*, 458 U.S. 613, 650 (1982).

[222] Robert L. Ivie, "Rhetorical Deliberation and Democratic Politics in the Here and Now," *Rhetoric and Public Affairs* 5.2 (2002): 279.

between citizen and state and this relationship ought to be free from the unnecessary interference of political parties. If the state were to develop a plan that "favor[s] one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community, they would violate the constitutional guarantee of equal protection."[223]

To increase competitiveness the political parties would need to relinquish some control of the process. However, the problem is that this prohibition stands only to the degree in which human actors accept them and relinquish their partisan interests. Both Samuel Issacharoff and Richard Posner argue that one way to accomplish this task would be to invoke anti-trust jurisprudence into reapportionment and redistricting law. [224] The "political markets" approach should govern the reapportionment and redistricting process in increase competition in the process provides a call for increasing the amount of deliberation amongst citizens and between citizens and political parties.[225] Issacharoff writes:

> Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. Further, the focus on competitive

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[223] *Karcher* v. *Daggett*, 462 U,S, 725, 748 (1983).

[224] Samuel Issacharoff, "Gerrymandering and Political Cartels," 606; Richard Posner, *Law, Pragmatism, and Democracy*, 246.

[225] Samuel Issacharoff, "Gerrymandering and Political Cartels," 606; Richard Posner, *Law, Pragmatism, and Democracy*, 246.

> processes ties back to the undeveloped original Madisonian understanding of republican government as one that "derives all its powers … from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour [sic]."[226]

By valuing deliberation, and the rhetorical tradition, this position connects the Madisonian vision of the Republic with the Supreme Court's decision in *Gomillion*, *Baker*, and *Reynolds*. Further, it limits the role of the political parties to assume representation on behalf of the individuals before the elections occur but could still provide elite for of representation after the elections. Finally, it reestablishes legitimacy in terms of democratic accountability and creates democratic structures on the basis that representation concerns substantive acting for. However, the main constraint against this position is judicial. In *Vieth v. Jubelirer*, Justice Antonin Scalia argues that there are no judicially manageable standards to guide the Supreme Court in this area of law. Further, and even more devastating, Scalia notes that the four dissenters develop three different standards and all of them are different from the two standards in *Davis*.[227] It is not that this position would not ever become law; with the Supreme Court Justices on the Court now, this will not become law now.

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[226] Samuel Issacharoff, "Gerrymandering and Political Cartels," 617.

[227] *Vieth* v. *Jubelirer*, 541 U.S. 267, 292 (2004).

Conclusion: Divergent Paths of the Law

The biggest victories for the Liberal Justices on the Supreme Court arrived in 1982 when Congress amended the VRA to protect the ability of racial minorities to elect communities of choice and its decision in *Thornburg* v. *Gingles*, which upheld the 1982 amendments. Civil Rights groups were jubilant after the ruling. Ralph Neas, executive director of the Leadership Conference on Civil Rights, stated, *Gingles* stands as an "an overwhelming repudiation of the (administration's) attempt to gut the voting rights act."[228] Julius LeVonne Chambers, of the NAACP Legal Defense and Educational Fund, stated, "Once again, another branch of government has reined in the extremism of the Department of Justice. [The ruling] gives us a powerful new tool for protecting the equal rights of minorities to register, to vote and to have their votes counted with equal weight."[229] Even Senate Majority Leader Bob Dole, found pleasant words to describe the ruling, stating. "Racial and ethnic minorities will be entitled to participate in the electoral process."[230] Kathryn Abrams writes that though vestiges of slavery and segregation still exist, the Supreme Court's *Gingels*' test represents a crucial victory for racial minorities, ending the "stark exclusion and disenfranchisement of minority citizens."[231]

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[228] James H. Rubin, "Supreme Court Ruling on Gerrymandering Causing Uncertainty," The Associated Press, 1 July 1986.

[229] James H. Rubin, "Supreme Court Ruling on Gerrymandering Causing Uncertainty," The Associated Press, 1 July 1986.

[230] James H. Rubin, "Supreme Court Ruling on Gerrymandering Causing Uncertainty," The Associated Press 1 July 1986.

[231] Kathryn Abrams, "'Raising Politics Up': Minority Political Participation and Section 2 of the Voting Rights Act," *New York University Law Review* 63 (1988): 449.

Not everyone warmly received the Court's decision in *Gingles*. Mary J. Kosterlitz, states that in *Gingles*, the Supreme Court failed to develop a "definitive standard for determining the degree of significant racial bloc voting," which is the interpretive key in understanding §2 claims.[232] Further the fractured opinions would undermine the weight of the majority's opinion as the court failed to reach consensus on the absence or presence of racial bloc voting.[233] The decision does not address explicitly the "question of remedies or the tension between the statutory language and the legislative history." Legislation under *Gingles* will cause lower courts to interpret §2 favorably to plaintiffs and allow for "reasonable proportional" remedies.[234] Assistant Attorney General William Bradford Reynolds, head of the Justice Department's civil rights division, described the defeat as being not as bad as it seems since it did not endorse safe seats for minorities.[235]

While some admired the Court's decision in *Gingles*, *Davis* did not fare as well. Since the Court could not reach an agreement, numerous scholars offered their advice on how to create a judicially manageable standard for districting.[236] Of course, as Bruce Cain

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[232] Mary J. Kosterlitz, "*Thornburg* v. *Gingles*: The Supreme Court's New Test for Analyzing Minority Vote Dilution," *Catholic University Law Review* 36 (1987): 562.

[233] Mary J. Kosterlitz, "*Thornburg* v. *Gingles*," 562 -563.

[234] Andrew P. Miller and Mark A. Packman, "Amended Section 2 of the Voting Rights Act," 3 – 4.

[235] James H. Rubin, "Supreme Court Ruling on Gerrymandering Causing Uncertainty," The Associated Press, 1 July 1986.

[236] For a partial list, see Bernard Grofman, "Toward a Coherent Theory of Gerrymandering: *Bandemer* and *Thornburg*," 53; Gordon E. Baker, "The 'Totality of Circumstances' Approach" *Political Gerrymandering and The Courts*, ed. Bernard Grofman. (New York: Agathon Press, 1990), 203 – 211; Michael D. McDonald and Richard L. Engstrom, "Detecting Gerrymandering," in *Political Gerrymandering and The Courts*, ed. Bernard Grofman. (New York: Agathon Press, 1990), 189.

notes, even in the field of political science, there is no one indicator to point to "fair representation," and no consensus as to the meaning of "fair representation,"[237] which diminishes the ability of the Supreme Court to develop standards to judge "fair representation." Cain believes that because of the lack of standards, then the Court will not likely intervene in political gerrymandering cases and the Davis decision may help excluded groups but not Republicans or Democrats.[238] Noting the partisan implications, Rep. Tony Coelho (D-CA), chairman of the House Democratic Campaign Committee, said Davis would be "decided by state legislatures which are dominated by Democrats rather than federal courts which are dominated by Republicans."[239]

Apparently, consensus after the decision rested on the rejection of the Court's work as the only ones who would benefit would be lawyers and political scientists. *The Wall Street Journal* noted that the Supreme Court's decision would lead to "complicates, costly and time-consuming suits."[240] After the Court's decision in Davis, Republicans challenged Rep. Phillip Burton's (D-CA) egregious redistricting effort in California that protect the political parties.[241] Bruce Fein, a court watcher for the American Enterprise

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[237] Bruce C. Cain, "Perspectives on *Davis v. Bandemer*: Views of the Practitioner, Theorist, Reformer," in *Political Gerrymandering and The Courts*, ed. Bernard Grofman. (New York: Agathon Press, 1990), 117.

[238] Bruce C. Cain, "Perspectives on *Davis v. Bandemer*,"118 – 119.

[239] James H. Rubin, "Supreme Court Ruling on Gerrymandering Causing Uncertainty," The Associated Press, 1 July 1986.

[240] Kimball W. Brace, "Lawsuit Will Be a New Growth Industry," *The Wall Street Journal,* 29 August 1986 Page 1 Column 16.

[241] Ron Roach, "Gerrymandering Ruling Breathes Life Into GOP Redistricting Challenge," *Tribune Sacramento Bureau,* 26 July 1986 A-1.

Institute, declared that the ruling "will parent literally hundreds of court challenges ... and place the electoral process in turmoil," as it would lead to "a decade of litigation" to interpret the requirements.[242] Harvard Law Professor Philip Heymann stated it will be difficult to interpret Davis as, "It's extremely hard to figure out what they're going to require before anyone can bring a lawsuit." [243] He did admit the "real winners" from Davis would be the citizens, stating, "I think voters benefit because it means that on the whole, whether you're a Democrat or a Republican, there is more chance that your vote will matter."[244]Samuel Issacharoff writes that the Supreme Court's decision in Davis attempts to combine racial vote dilution claims, which concerns anti-discrimination law, and the political process, resulting in a jurisprudence that potentially possesses "sweeping breadth but of virtually no meaningful application."[245] John Petrocik, a professor of government at the University of California, said "not only are a lot of lawyers going to make a lot of money, but many of my colleagues in the political science profession are going to get some healthy consulting fees."[246]

The divergent paths by the Supreme Court would connect together in 1993, when the Supreme Court issued its decision in *Shaw* v. *Reno*, a case that integrated racial and political gerrymandering though the Court would only discuss the racial aspects. In less

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[242] Andrea Neal, "Ruling Opens New Era for Redistricting," United Press International, 14 July 1986.

[243] Andrea Neal, "Ruling Opens New Era for Redistricting," United Press International, 14 July 1986.

[244] Andrea Neal, "Ruling Opens New Era for Redistricting," United Press International, 14 July 1986.

[245] Samuel Issacharoff, "Gerrymandering and Political Cartels," *Harvard Law Review* 116 (2002): 598.

[246] Thomas B. Edsall, "Gerrymandering Ruling Seen Benefiting GOP; Numbers Appear to Work Against Democrats," *The Washington Post*, 1 July 1986 p1.

than twenty years after *Davis* and *Gingles*, only one decision would be left standing. However, with the current Justices on the Supreme Court it is not clear how long other decisions will stand as constitutional law.

CHAPTER VI

VISIONS OF DEMOCRACY: PARTISANSHIP, RACE, AND THE RHETORIC OF RECONCILIATION

I have always believed in democracy, and nothing I have ever written is inconsistent with that. I have always believed in one man, one vote, and nothing I have ever written is inconsistent with that. I have always believed in fundamental fairness, and nothing I have ever written is inconsistent with that. I am a democratic idealist who believes that politics need not be forever seen as an 'I win, you lose' dynamic in which some people are permanent, monopoly winners and others are permanent, excluded losers. Everything I have written is consistent with that. I hope that what has happened to my nomination does not mean that future nominees will not be allowed to explain their views as soon as any controversy arises. I hope that we are not witnessing that dawning of a new intellectual orthodoxy in which thoughtful people can no longer debate provocative ideas without denying the country their talents as public servants. I also hope that we can learn some positive lessons from this experience, lessons about the importance of public dialogue on race in which all perspectives are represented and in which no one viewpoint monopolizes, distorts, caricatures or shapes the outcome.[1] Lani Guinier

I think that's what the [civil rights] struggle was all about, to create what I like to call a truly interracial democracy in the South. In the movement, we would call it creating the beloved community, an all-inclusive community, where we would be able to forget about race and color and see people as people, as human beings, just as citizens. Rep. John Lewis (D-GA)[2]

In *Whose Vote Counts,* Abigail M. Thernstrom states that though no group is required by legislation to receive proportional representation, decisions from the federal judiciary allowing for "fair" representation constitute the enactment of "proportional representation," resulting in "a controversial policy that has somehow stirred no

[1] "Excerpts from Lani Guinier's News Conference," *The Washington Post,* 5 June 1993 A10.

[2] Georgia Representative and Civil Rights Activist John Lewis *quoted in Georgia* v. *Ashcroft*, 539 U.S. 461, 490 (2003).

controversy."[3] Six years after the publication of her text, Thernstrom would find her controversy on the issue of "fair" representation though debate on that topic would remain unfulfilled. On April 29, 1993, almost two years after the spectacle of the Clarence Thomas nomination, President William Jefferson Clinton faced a political nomination battle over his appointment of Lani Guinier to lead the Justice Department's Civil Rights Division. Unlike Thomas, Guinier's sin concerned scholarship and activism as she advocated for the protection and enhancement of the rights of minorities through representation even if it meant the abandonment of traditional, territorial districting and single vote elections.[4] In her research, Guinier challenged the politics of the Reagan administration, protesting its decision to define civil rights in terms of "special interests" and discuss anti-discrimination in terms of confrontation rather than consensus.[5] Because of the Reagan Administration's framing of these issues, Guinier feared that debate between blacks and whites in society would be polarized solely for the benefit of electoral gain.[6] Though her activism, Guinier challenged legislative districts in North Carolina and Louisiana that diluted the votes of black voters, securing the protection of political

[3] Abigail M. Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights*, (Cambridge: Harvard University Press, 1987), 233.

[4] See Lani Guinier, The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success," *Michigan Law Review* 89 (1991): 1077 – 1154; Lani Guinier, "No Two Seats: The Elusive Quest for Political Equality," *Virginia Law Review* 77 (1993): 1413 - 1514; Lani GUinier, The Representation of Minority Interests: The Question of Single-Member Districts," *Cardozo Law Review* 14 (1993): 1135 – 1174. Lani Guinier, "Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes," *Texas Law Review* 71 (1993): 1589 – 1642; Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy*, (New York: The Free Press, 1994); Lani Guinier, *Lift Every Voice: Turning a Civil Rights Setback Into a New Vision of Social Justice*, (New York: Simon & Schuster, 1998).

[5] Lani Guinier, *The Tyranny of the Majority,* 24.

[6] Lani Guinier, *The Tyranny of the Majority,* 24.

equality and fairness for those that could not seek it at the polls.[7] Like the nomination of Clarence Thomas two years prior, because of her words and her deeds, partisan forces challenged the nomination; however, unlike the Thomas controversy, President Clinton abandoned Guinier nomination rather than defend her nomination.

In response to her nomination and controversial academic work, Conservatives initiated a campaign to "Bork" Guinier. Rather than allow a confirmation hearing to judge the merits and the experience of Guinier—a treatment that even Robert Bork received—, partisan groups preemptively attacked her positions on the nature of American Democracy. After her appointment announcement, Guinier was defined as being a "Quota Queen," and a "Social Engineer;" opponents argued that her views were "anti-Democratic" since she believed that some decisions required a super-majority rather than just a majority.[8] Political columnist David Broder characterized Guinier's position as one which, "the rules of the game must be constantly rewritten to ensure that [blacks and other minorities] are not victimized."[9] Lally Weymouth, a conservative journalist, argued against Guinier's "radicalism," suggesting that majority run-off voting schemes Guinier desired may violate the Voting Rights Act (VRA); however, Weymouth failed to criticize John Dunne, the Bush Administration's Assistant Attorney General for civil rights, when he

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[7] Carl T. Rowan, "Media Attack Victimimizes Lani Guinier," *The Chicago-Sun Times,* 2 June 1993 p.35.

[8] Carl T. Rowan, "Media Attack Victimimizes Lani Guinier," 1993 p.35.

[9] Elaine R. Jones, "Broder v. Guinier," *The Washington Post,* 20 June 1993 C7.

described majority run-off schemes as "electoral steroids for white candidates."[10] Clint Bolick, an aide to William Bradford Reynolds who acted as the Civil Rights Division chief that approved the Louisiana District that Guinier fought, argued that she would not be satisfied with proportional representation[11] and advocated for a "complex racial spoil systems," guaranteeing the election of black representation.[12] Because of the public backlash, even Democrats capitulated. In response to her writings, Joseph Biden (D-CT) stated that the nomination concerned him and, though he stated she needed to defend her views in public, he and the Senate Judiciary Committee searched for a way out of providing her a hearing.[13] Southern Democrats were especially upset with her nomination, especially in relation to a possible political backlash over Guinier's views of the VRA and minority representation. [14] Senator John Breaux (D-La), asked that President Clinton "not to push forward with her" as her academic work did not fit with what the Senator would define as a "mainstream type of Democrat."

In an attempt to save her nomination, Guinier appeared on *Nightline* to plead for the chance to receive a hearing in the Senate.[15] Yet, that appearance failed to save her

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[10] William T. Coleman Jr., "Three's Company: Guinier, Reagan, Bush," *The New York Times* 4 June 1993 A13.

[11] Anthony Lewis, "The Smearing of Lani Guinier," *Plain Dealer,* 7 June 1993 7B.

[12] Carl T. Rowan, "Media Attack Victimimizes Lani Guinier," 1993 p.35.

[13] Anthony Lewis, "Anatomy of a Smear: The Lynching of Guinier," *Pittsburg Post-Gazette,* 6 June 1993 B3.

[14] Ruth Marcus and Mihael Isikoff, "Administration Leaves Guinier in Limbo; Clinton May Withdraw Name," *The Washington Post,* 3 June 1993 A1.

[15] Ruth Marcus and Mihael Isikoff, "Administration Leaves Guinier in Limbo," A1.

nomination. Responding to the public pressure against his nominee, President Clinton withdrew her nomination on June 4, 1993. Even though President Clinton vowed to fight for racial equality and desired a serious discussion about race in America, President Clinton could not defend his nominee. In a public announcement, Clinton stated that, *after reading her work*, Guinier's articles lend themselves to interpretations that he did not express on the campaign trail, views that he holds "very dearly." Though he agreed with some of the sentiments in the articles, the President stated if he had read her academic research before he nominated her, he would not have nominated her,[16] as her ideas on electoral empowerment were "too radical."[17] Claiming that the polarized battle over her nomination conflicted with Clinton's campaign pledge to unite not divide, Clinton abandoned his nominee.[18] While the President attempted to define the situation over a debate over representation he could not defend, in the end, the nomination concerned a battle of wills Clinton failed to win.

The Guinier controversy exists at the nexus between partisan interests and racial reconciliation, between the representation of majority interests and the protection of minority rights. Randall Kennedy, a professor at Harvard Law School, stated that Guinier,

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[16] "Excerpts from Clinton's Announcement," *The Atlanta Journal and Constitution,* 4 June 1993.

[17] Michael Kelly, "Words and Deeds: The Guinier Affair Aggravates Clinton's Credibility Problem" *The New York Times,* 6 June 1993 http://query.nytimes.com/gst/fullpage.html?res=9F0CE4D61E30F935A35755C0A965958260&sec=&spon=&pagewanted=1.

[18] Excerpt from Clinton's Announcement," *The Atlanta Journal and Constitution,* 4 June 1993. In a question and answer session after the announcement, President Clinton stated that he could not defend her views on proportional representation and on minority veto as he labeled these tendencies anti-democratic.

"asked very tough questions about our democracy…and we're supposed to be against someone for asking questions."[19] He added, "She has been attacked for trying to destroy the system when all she wants to do is make minorities more involved in the system. I can't helping thinking that the sense she is somehow alien comes from ignorance, or mere rhetoric meant to inflame public opinion against her."[20] Mark Lawrence McPhail notes that the Guinier nomination, "reveals the resistance of white Americans to a coherent account of racial injustice and discrimination in America."[21] While the Guinier controversy avoided a discussion on the merits of competing forms and practices of representation, Guinier's writings can be considered controversial since it threatened those who would "subordinate our most basic right to vote to partisan agendas and political expediency," rather than commit to a process whereby all voices should be heard and all votes counted.[22]

Twenty-four days after President Clinton withdrew Lani Guinier's nomination and the country avoided a discussion of race and representation, the Supreme Court released its decision in *Shaw* v. *Reno,* 509 U.S. 630 (1993). In a 5 - 4 decision authored by Justice Sandra Day O'Connor, a majority held that a North Carolina district was so bizarrely drawn and irrational on its face that it could only be understood as a means to segregate

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[19] David Von Drehle, "Lani, We Hardly Knew Ye: The Lawyer Who Burned Briefly—but Too Brightly for Her Own Good," *The Washington Post,* 4 June 1981 C1.

[20] David Von Drehle, "Lani, We Hardly Knew Ye," C1.

[21] Mark Lawrence McPhail, *The Rhetoric of Racism Revisited: Reparations or Separation?* (Lanham: Rowman & Littlefield press Publishers, Inc. 2002), 184.

[22] Mark Lawrence McPhail, *The Rhetoric of Racism Revisited,* 194.

voters into separate districts based on race. [23] At stake in *Shaw I*, and in almost all of the cases during he 1990s and 2000s, concerned the reconciliation of race and representation in America. More specifically, the Court entertained the idea as to what would be the best way to reconcile competing racial attitudes in the United States through the redistricting process. Yet, the Guinier controversy suggested that the Supreme Court may be in a better position to debate racial reconciliation in the United States. Though the Justices advance ideological positions, the process and discussion of race would not equate the spectacle of the Guinier controversy.

Beneath the Supreme Court's discourse on representation, the Justices debate the meaning of reconciliation in two distinct areas. In the first field, the Justices debate the best means to employ the political system to achieve reconciliation between competing races and ethnicities. In the second field, the Justices debate how to reconcile an ideal form of American Democracy with a partisan political system that desires to limit the ability of that democracy to flourish. In terms of racial reconciliation, the Conservatives Justices argue that the path toward reconciliation lies with treating people as individuals, regardless of their race.[24] For the Liberal Justices, the path to reconciliation occurs by

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[23] *Shaw* v. *Reno*, 509 U.S. 630, 652 (1993).

[24] In the Vote Dilution and "Analytically Distinct" cases arising under Section Two of the VRA, the conservatives did not vote as an ideological bloc in all of the cases. The most conservative justices, Justices Thomas and Scalia, consistently argued against the use of race in all of the cases, except in the unanimous decisions of *Growe* and *Voinovich* where the party possessing the burden of proof to show vote dilution did not establish a prima facie case. While Justices Thomas and Scalia opposed the use of race, Justices O'Connor and Kennedy acted as swing votes depending on the facts of the case. In the vote dilution cases, Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy voted with the liberal bloc in *Johnson* v. *DeGrandy*, and Justice Kennedy voted with the liberal bloc voted in *LULAC* v. *Perry*. In the "Analytically Distinct" cases, most of the decisions were 5 – 4 ideological votes whereby the Conservatives Justices argued

allowing political cohesive groups access to the political process regardless of their race or ethnicity. Further, for political reconciliation, the Conservatives Justices argue that the process is self-correcting and democracy flourishes through conflict. Conversely, the Liberal Justices argue that democracy diminishes with the threat of partisan entrenchment

Previous research on the topic of the rhetoric of reconciliation focuses on oppositional groups developing communicative practices necessary to reject violence and accept communal understanding. Important to the premise of the rhetoric of reconciliation is that discourse can shape the social word, overcoming divergent cultural, economical, political, and social divisions. According to Erik Doxstader, reconciliation serves as a "call for and practice of communication," to "convert violence into a set of shared oppositions that can motivate and sustain dialogue."[25] Reconciliation is a moment of rhetorical history-making, to define a time of transition and to employ that transition "in the name of public deliberation," examining "how speech invents the potential for politics."[26] Similarly to Doxtader, John B. Hatch views reconciliation as a rhetorical process that focuses on the communicative and sociopsychological aspects of

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against the use of race as a classification for districting except for *Hunt* v. *Cromartie* (9 – 0) and *Easley* v. *Cromartie* (5 – 4) where politics and not race was declared the dominant factor in the creation of the districts. In the case involving Section 5 of the VRA, the cases were settled along ideological lines in 5 – 4 decisions with the Conservative Justices controlling the vote except for Branch v. Smith, which included a part unanimous, a part 6 – 3 majority, and part plurality decision.

[25] Erik Doxstader, "Making Rhetorical History in a Time of Transition," *Rhetoric and Public Affairs* 42 (2001): 225.

[26] Erik Doxstader, "Making Rhetorical History in a Time of Transition," 227.

reconciliation to achieve "coherent reconstruction of identities and relationships,"[27] that frees the "offended and offending parties from the law of essentialist identity and into the rhetorical embrace of redeemed relationship and community."[28] Important in this concept is the balance between the comic and the tragic to eliminate guilt in society and, "bridge across the sociopsychological chasm between complicity and coherence.[29] The aim of reconciliation is not a fixed and final unity of identity (for example, a color-blind society), but rather a fluid, evolving harmony connecting differences and moments of dissonance in a diverse society."[30] However, this reconciliation may occur only to the extent the people and political or cultural leaders are wiling to make it viable and, when it does, it will occur through a process rather than develop instantaneously.[31]

While Hatch focuses on the communicative aspects of reconciliation, Kirt Wilson, Mark Lawrence McPhail, and Erik Doxtader discuss the limitations to focusing solely on communication, especially in relation to the political structures that can limit or

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[27] John B. Hatch, "Reconciliation: Building a Bridge from Complicity to Coherence in the Rhetoric of Race Relations," *Rhetoric and Public Affairs* 6.4 (2003): 753.

[28] John B. Hatch, "Reconciliation," 753.

[29] Hatch bridges two conceptions by Kenneth Burke, calling it the tragicomic frame. According to Burke's thought, each society possesses a certain social order and, when individuals break the social order, guilt results. The tragic frame and the comic frame serve as linguistic tools to resolve the guilt. The tragic frame inflicts punishment on the self (mortification) or the Other (scapegoat). The comic frame fulfills transcendence as it asks people to overcome the problem without inflicting punishment, to observe the self, reach "maximum consciousness," and transcend oneself by noting one's errors. For a discussion on scapegoating, see Kenneth Burke, *On Symbols and Society*, ed. Joseph R. Gusfield (Chicago: The University of Chicago Press, 1989), 294 – 302. For a discussion of the comic corrective, see Kenneth Burke, Attitudes Toward History, (Berkeley: University of California Press, 1959), 170 – 173.

[30] John B. Hatch, "Reconciliation," 753 – 754.

[31] John B. Hatch, "Reconciliation," 754.

prevent attitude formation and politico reconciliation. Kirt Wilson argues that a model of reconciliation, "lies not in a cathartic experience that removes shame, guilt, and victimage but in a rhetoric that induces the public to consider that its interests are served by dismantling existing systems of white privilege. Even this approach is limited, because reconciliation, itself, may be incapable of solving the structural roots of racism."[32] By rejecting the sociopsychological, Wilson argues that the focus of reconciliation needs to examine the structures in society, such as the economy, education, healthcare, rhetoric, politics, and culture, that perpetuates inequality and that privilege one race over another.[33] Mark Lawrence McPhail provides another skeptical approach to Hatch's position, especially in regards the ability of rhetoric, and rhetoric alone, to establish reconciliation. McPhail argues that attentions should focus on the "social and psychological impediments to racial reconciliation" and believes it will take more than rhetoric to "reconcile the long and tragic history of white supremacy and racism;" what will be needed is a resigning of the racial contract and credible acts of atonement by whites to "move the rhetoric of racism through complicity and toward coherence."[34] If reconciliation were to occur, it

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[32] Kirt Wilson, "Is There Interest in Reconciliation," *Rhetoric and Public Affairs* 7.3 (2004): 368.

[33]Kirt Wilson, "Is There Interest in Reconciliation," 368. Relying on the work of Critical Race Theorist Daniel Bell, Wilson argues a point on human nature, saying that expansion of civil rights occurs only through "interest-convergence" whereby the dominant institutions in society would benefit by the expansion of rights in society.[33] It would be imperative for any theory of reconciliation to develop a "material white interest," which would contradict Hatch's thesis. See Derrick A. Bell, "*Brown v. Board of Education* and the Interest Convergence Dilemma," in *Critical Race Theory: The Key Writings That Formed the Movement,* ed. Kimberle Crenshaw et al. (New York: New Press, 1995), and Derrick A. Bell, Silent Covenants: "Brown v. Board of Education" and the Unfulfilled Hopes for Racial Reform (New York: Oxford University Press, 2004).

[34] Mark Lawrence McPhail, "A Question of Character: Re(-)signing the Racial Contract," *Rhetoric and Public*

must develop credible arguments from an accepted source that examines and develops the best way to present arguments that alters the Racial.

Similarly to Wilson and McPhail, Doxtader's response examines the structural foundations that limit reconciliation. While Hatch desires to study the "grammars of rhetoric" behind reconciliation, such as the confession, apology, and reparation to find reconciliation's "tumultuous beginnings," Doxtader's states that what is necessary to achieve reconciliation concerns developing proper preconditions for debate, especially in developing common ground, how to establish the terms for common ground, what motivates people to find common ground, who can initiate the common ground, how will it proceed, and under what conditions of accountability.[35] The problems with these questions reveal that reconciliation may occur through societal institution, such as the law, which has everything to gain by ensuring that redemption occurs in the future and not the present.[36]

This chapter builds upon the suggestions of Wilson, McPhail, and Doxtader by examining the rhetoric of reconciliation through the structural elements of constitutional law in the Supreme Court's reapportionment and redistricting cases during the 1990s and 2000s. Reconciliation concerns the construction and maintenance of rhetorical identities

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Affairs 7.3 (2003): 393. The definition of Ethos McPhail relies upon is from James S. Baumlin, "Ethos," in *Encyclopedia of Rhetoric*, ed. Thomas O. Sloane (Oxford: Oxford University Press, 2001), 263.

[35] Erik Doxtader, "The Potential of Reconciliation's Beginning: A Reply," *Rhetoric and Public Affairs* 7.3 (2003): 381 – 382.

[36] Erik Doxtader, "The Potential of Reconciliation's Beginning," 387.

for citizens through representation, the structuring of the ground on which divergent groups speak through the representations, and the transformation of the law and the citizen by an arbitrator of the law, seeking to balance the understanding of the law and the divergent political and social claims for those petitioning the law. This is a legal and secular form of reconciliation that seeks to balance competing claims of political equality and political fairness necessary to invent and sustain common ground on which the American democracy rests. The Supreme Court's role in the discussing reconciliation is unique since they act as the *arbitrators of public reason*, helping to provide a sense of justice to an area they may only experience on an intellectual level, with Clarence Thomas as, maybe, the lone exception.

Acting as an authority on behalf on the parties presenting claims, who themselves act for larger segments of society, the Justices negotiate ways in which elections in the United States should establish common ground to encourage reconciliation between racial groups even if elections between competing parties concern division. The Supreme Court faces numerous constraints to this reconciliation as partisan interests and political ideologies attempt to gain dominance for heir ideas and racially-polarized voting separates the ability of citizens to find common ground. As Matthew J. Streb notes, the racial puzzle in U.S. elections concerns the fact that even though race has disappeared as a major political issue, voting polarization along racial and partisan lines continues as African-

Americans, almost homogeneously, support the Democratic Party.[37] In the process of deciding these cases, the Supreme Court damages its own ethos, developing different standards to judge its apportionment and districting cases.

During the 1990s and 2000s, the Supreme Court's reapportionment and redistricting decisions concern the development of common ground on which citizens can work towards reconciliation and the establishment of interpretive dominance of the reconciliation process. Yet, political ideologies exacerbate the debate on the Court and the Justices align themselves to advance partisan ends regardless of the rhetorical traditions on redistricting. In this debate, the Conservative Justice desire the attainment of reconciliation by defining voting as an individual right, treating voters as individuals and not as members of groups, and developing a theory of representation that invokes the language of segregation to advocate for reconciliation. Additionally, to preserve political equality, the Conservative Justices argue that the Court must adopt a color-blind interpretation of the Constitution. Conversely, the Liberal Justices on the Court reject the language of segregation and representational harm and advance an ideology of representation that argues reconciliation may occur only if racial minorities possess political equality as a group. Additionally, to argue against the advancement of a color-blind Constitution, the Liberal Justices attack the ethos of the conservative majority and its rejection of the Supreme Court's rhetorical tradition. While the majority of the Court

[37] Matthew J. Steb, *The New Electoral Politics of Race,* (Tuscaloosa: The University of Alabama Press, 2002), 8. Streb notes that in 2000 George W. Bush received 9% of the black vote, the highest total in almost thirty years. Conversely, Al Gore received over 90%.

argues reconciliation can only occur if the government looks beyond race, the dissenters argue that citizens need to sustain political equality before they can deliberate on reconciliation.

Social Context: The Politicization of the Law

During his tenure in office, President George H.W. Bush filled two vacancies on the Supreme Court. On July 20th, 1990, Justice William Brennan reluctantly stepped down from the High Court after he suffered a slight stroke from a fall.[38] Not wanting an ideological fight over this nomination during an election year, President Bush missed his opportunity to replace the most prominent liberal member of the Supreme Court with a prominent conservative. President Bush's nomination of David Souter, which rested on the assurances by White House Chief of Staff John Sununu to the Conservative base that the selection would be "a home run,"[39] passed through Congress without confrontation and disappointed conservatives immediately. On June 27, 1991, Justice Thurgood Marshall, the last of the die-hard liberal justices of the Supreme Court, announced his retirement from the Supreme Court, stating colorfully, "I'm getting old, and coming apart."[40] Marshall's retirement, announced almost a year to the day after Justice William Brennan announced his retirement, left a democratic void on the bench as only two members of the *Thornburg* plurality section, Justices Blackmun and Stevens, remained on

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[38]Jan Crawford Greenburg, *Supreme Conflict: The Inside Story of the Struggles and Control of the United States Supreme Court*, (New York: Penguin Press, 2007), 87.

[39] Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court*, (New York: Doubleday, 2007), 21.

[40] Jeffrey Toobin, *The Nine*, 25.

the High Court.[41] While avoiding a political and judicial confrontation for the first choice, White House Chief of Staff John Sununu promised a 'knock-down, drag-out, bloody-knuckles, grassroots fight."[42] The Bush Administration fulfilled this promise with the nomination of Clarence Thomas. Because of his originalist method, his desire to interpret the Constitution of 1789, his commitment to Natural Law, and his beliefs that the "crown jewels" of the liberal court, such as *Miranda* and *Roe*, ought to be overturned,[43] conservative activists believed that President Bush's appointment fulfilled the promise of conflict between conservatives and liberals. And a fight there was.

The appointment process of Clarence Thomas exceeded the partisan and ideological battle over President Ronald Reagan's appointment of Robert Bork to the Supreme Court in 1987.[44] Knowing the legal and constitutional stakes over a successful appointment, Democrats and Republicans planned to engage one another over the success of the nomination, with Republicans going so far as to create a war room, prepping the candidate, and, more importantly, reaching out to African-American special-interest groups to prevent a unified liberal front in opposition to Thomas.[45] To advance the

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[41] Jeffrey Toobin, *The Nine*, 21.

[42] Jeffrey Toobin, *The Nine*, 21.

[43] Jeffrey Toobin, *The Nine*, 21. Mark Tushnet, A Divided Court: The Rehnquist Court and the Future of Constitutional Law, (New York: W.W. Norton & Company, 2006), 89.

[44] See Mark Tushnet, *A Court Divided*, 333 – 338. Trevor Parry-Giles, *The Character of Justice: Rhetoric, Law, and Politics in the Supreme Court Confirmation Process*, (East Lansing: Michigan State University Press, 2006), 115 – 138.

[45] See Mark Tushnet, *A Court Divided*, 80.

nomination, the Bush Administration developed a "Pin Point" strategy to reveal Thomas's character through the realization of the American Dream, beginning with a life with hardship in and poverty, highlighting the dedication of family, and leading to the nomination on the Supreme Court.[46] According to Trevor Parry-Giles, "because of the celebritizing power of the Pin Point strategy, Clarence Thomas was only a talented and hard-working man who had triumphed over adversity, overcome the shackles of segregation, and achieved the highest pinnacles of success in America."[47]

Yet, the nomination process moved toward an unexpected turn and the credibility of the Pin Point strategy decreased when Anita Hill, and a few other of Thomas' co-workers, stepped forward with allegations that Thomas repeatedly sexually harassed them. Thomas denied those accounts, as Mark Tushnet suggests, because he may not have believed he did anything wrong, he may have forgotten that aspect of his life before he married his second life, Virginia Lamp, or he trapped himself within the "simplifications of the media story of his successes," whereby he could not have committed those acts.[48] Thomas ended this debate, and salvaged his nomination, when he declared that his judicial nomination process was a "travesty," that "the Supreme Court was not worth it," and, more emphatically:

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[46] Trevor Parry-Giles, *The Character of Justice*, 144 – 145.

[47] Trevor Parry-Giles, *The Character of Justice*, 147.

[48] See Mark Tushnet, *A Court Divided*, 82 - 83. Based on recommendations of the War Room, Thomas adopted a Pin-Point strategy where he would downplay his ideas and focus on his history, and successes, in life. The weakness of this strategy, according to Tushnet, developed as Thomas characterized himself with few ideas, reinforcing the perception that he had no ideas of his own, (82).

> And from my standpoint as a black American, as far as I'm concerned, it is a high-tech lynching for uppity blacks who in any way deign to think for themselves, to do for themselves, to have different ideas, and it is a message that unless you kowtow to an old order, this is what will happen to you. You will be lynched, destroyed, caricatured by a committee of the U.S.— U.S. Senate, rather than hung from a tree.[49]

After rhetorically turning the nomination process into a Civil Rights issue and turning the language of liberalism against his opponents, Thomas ended discussion over the alleged charges of harassment with his "high-tech lynching" comments. After voting, Thomas survived the closest vote for a sitting Justice, receiving 52 votes in favor and 48 votes in opposition, most of which were straight party line votes. Like the Supreme Court's decision in *Bush* v. *Gore*, the belief in the guilt or innocence of Thomas resembles a political Rorschach test and generally reflects the political ideology of the viewer. This aspect of the Thomas controversy reflects the ideological batter over the law during the 1990s and the 200s.

During his tenure as president, William Jefferson Clinton did not face nomination problems over his choices of Ruth Bader Ginsburg, who replaced Justice Byron White, and Stephen Breyer, who replaced Harry A. Blackmun. However, in addition to his nomination fight over Lani Guinier, President Clinton faced political and legal battles over Travel Gate, Monica Lewinsky, his impeachment scandal, and a host of other Gates

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[49] Clarence Thomas, "Statement Before the Senate Judiciary Committee," 11 October 1991 http://www.americanrhetoric.com/speeches/clarencethomashightechlynching.htm.

designed to weaken his authority. When the Lewinsky scandal first broke, Hillary Rodham Clinton, "ascribed the president's difficulties to a 'vast right wing conspiracy,'" even if this statement deflected away from President Clinton culpabilities.[50] Jeffrey Toobin writes that the Clinton impeachment occurs in a series of political struggles in the guise of legal battles. He notes that during the 1950s, when numerous political agents shut out blacks from participating in the political process, lawyers, such as Thurgood Marshall, and special interest groups, such as the NAACP, turned to the judiciary to fight their battles. Eventually, Conservatives would rely on these political tactics, incorporating the language and concepts of liberals, to achieve their aim; "toward the end of the century, it was extremists of the political right who tried to use the legal system to undo elections— in particular the two that put Bill Clinton in the White House."[51] Yet, this political revolution would be unsuccessful. As Jeffrey Toobin writes, the trial itself was never in doubt as those that brought for the charges never possessed the 67 votes necessary as there were only 55 Republican Senators and only 50 voted for impeachment on the second vote.[52]

A year-and-a-half after the Clinton impeachment scandal, voters went to the polls to cast ballots for the President of the United States; some of those votes would count,

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[50] Jeffrey Toobin, *A Vast Conspiracy: The Real Story of the Sex Scandal that Nearly Brought Down a President*, (New York: Touchstone Books, 1999). 5.

[51] Jeffrey Toobin, *A Vast Conspiracy*: 6 - 7.

[52] Jeffrey Toobin, *The Nine*, 120.

others would not.[53] In December of 2000, the Supreme Court decided who would be the 43rd President of the United States in *Bush* v. *Gore*. In a 5 -4 decision by the Conservative majority, who would normally reject equal protection claims, the Court ruled that the manual recounts of the ballots cast in the Presidential Election violate the Equal Protection Clause since the canvassing boards in each county would rely on different standards to count the votes, diminishing the equal treatment of each voter.[54] As Owen Fiss argues there was nothing unique about *Bush* v. *Gore* as it represents the "culmination of twenty-five years of Supreme Court history that sought to repudiate the legacy of the Warren Court and to block the progressive realization of the Constitution.[55] Theodore O. Prosise and Craig R. Smith write that the legal inconsistency in the Supreme Court's decision and the interference with Florida law diminishes the ethos of the Supreme Court.[56]Clarke Rountree declares that the Supreme Court's decision in *Bush* v. *Gore* reveals judicial motives relating to the political and partisan concerns of the Justices and not motives that concern the development of democracy and the country's political institutions.[57]

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[53] As Clarke Rountree notes, African-American voters in Florida complained not only that their ballots were more frequently rejected, but they were more likely to be turned away form the polls when they cast their ballot.

[54] *Bush* v. *Gore*, 531 U.S. 98, 110 (2000).

[55] Owen Fiss, *The Law As It Could* Be, (New York: New York University Press, 2003), ix.

[56] Theodore O. Prosise and Craig R. Smith, "The Supreme Court's Ruling in Bush v. Gore: A Rhetoric of Inconsistency," *Rhetoric and Public Affairs* 4.4 (2001): 624 – 626.

[57] Clarke Rountree, *Judging the Supreme Court: Constructions of Motives in Bush v. Gore*, (East Lansing: Michigan State University Press. 2007), xv.

Yet, though the decision may be inconsistent with precedent, a few legal scholars argue that the Court's decision reflects the Equal Protection Standards that the Warren Court initiated in *Baker*, *Wesbery*, and *Reynolds*. For example, Richard H. Pildes writes that the Supreme Court's decision in *Bush* v. *Gore* stands as the "most dramatic moment in the constitutionalization of the democratic process that has been afoot for nearly forty years, ever since *Baker* dramatically lowered the 'political questions' barrier to judicial oversight of politics."[58] Ricahrd L. Hasen notes that the Supreme Court's decision in *Bush* v. *Gore* came to fruition from the seeds planted during the Reapportionment Revolution. Because of the Supreme Court's decision in *Baker*, the judiciary opened up their doors to election law cases previous Justices would not entertain[59] and, because of the One Person, One Vote rule and the definition of voting rights as a "fundamental right" in *Reynolds*, the Supreme Court relied upon the language of "equal protection" to strike down recounts that failed to determine a universal standard.[60] Richard H. Pildes states that the Supreme Court's decision "rests on an individual right to an equally weighted vote in a statewide election. This individual right reflects what the Court calls the 'equal dignity owned to

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[58] Richard H. Pildes, "*Bush* v. *Gore*: Democracy and Disorder," *University of Chicago Law Review* 68 (2001): 696

[59] Richard L. Hasen, *The Supreme Court and Election Law: Judging Equality from Baker* v. *Carr* to *Bush* v. *Gore*, (New York: New York University Press, 2003), 9.

[60] Richard L. Hasen, *The Supreme Court and lection Law*, 45. See Pamela S. Karlan, "Nothing Personal: The Evolution of the Newest Equal Protection from *Shaw* v. *Reno* to *Bush* v. *Gore*," *North Carolina Law Review* 79 (2001): 1345

each voter.'"[61] As stated previous, Justice Brennan's decision in *Baker* offered the American people a proposition about the role of the Courts: the Supreme Court would become the final arbiter of the Constitution in order to break the legislative entrenchment. Almost forty years after *Baker*, even the Conservative Justices, who typically argue against unnecessary judicial involvement in the political process, still offer the American people Justice Brennan's proposition when it suits their ideologically conservative ends.

While acting as President, one of the few accomplishments for George W. Bush concerns the transformation of the judiciary and the Department of Justice. Even neglecting the failed suggestion of Harriet Miers as a Supreme Court Justice, the triumph, or tragedy depending on ideology, of the Bush Administration is the transformation of the American judiciary through the addition of conservative justices who *interprets the law* and avoids *imposing their preferences or priorities on the people.*[62] During his tenure, the president replaced Chief Justice William Rehnquist with his much younger protégé and law clerk, Chief Justice John Roberts. Further, and even more important, President possessed the opportunity to replace the swing-vote of Justice O'Connor with a solid Conservative vote of Justice Samuel Alito. But even more important than appointing two Supreme Court

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[61] Richard H. Pildes, "The Constitutionalization of Democratic Politics," *Harvard Law Review* 118 (2004): 48.

[62] George W. Bush, "President Nominates Judge Samuel A. Alito as Supreme Court Justice," 31 October 2005 http://www.whitehouse.gov/news/releases/2005/10/20051031.html.

Justices, the president appointed 57 Conservative jurists to the U.S. Court of Appeals, a stepping-stone to the Supreme Court, and 237 justices at the trial court level.[63]

Furthermore, under the Bush Administration, officials at the Department of Justice engaged in partisan hiring practices, which would also help determine the meaning of the law. According to *The Washington Post*, an investigation into the hiring practices of career government lawyers by Monica Goodling, a counselor to former Attorney General Alberto Gonzales, reveal that the DOJ discriminated against applicants who were not Conservative or Republican.[64] During Senate testimony on the hiring scandal, Goodling admitted that she "crossed the line" as she considered political affiliation.[65] While there is a clear distinction between political appointees and career appointees, and it is illegal to hiring career appointees on the basis of political affiliation or allegiance, current Attorney General Michel Mukasey states that there will not be an investigation into the hiring practices and those who were turned away can reapply.[66] The investigation into the hiring practices provides another reminder of the politicization of the law and Justice under Gonzales, who is also under investigation for the potential political firing of eight US attorneys. According to *The New York Times*, the White House may have encouraged the

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[63] Jan Biskupic, "Bush's Conservatism to Live Long in the U.S. Courts," *USA Today,* 13 March 2008 http://www.usatoday.com/news/washington/2008-03-13-judges_n.htm.

[64] Mark Sherman, "Mukasey; No Prosecution in Justice Hiring Scandal," *The Washington Post,* 12 August 2008 http://www.washingtonpost.com/wp-dyn/content/article/2008/08/12/AR2008081201249.html.

[65] Dan Eggen, "Justice Dept. Expands Probe to Include Hiring Practices," *The Washington Post,* 31 May 2007 A04.

[66] Mark Sherman, "Mukasey; No Prosecution in Justice Hiring Scandal," *The Washington Post,* 12 August 2008 http://www.washingtonpost.com/wp-dyn/content/article/2008/08/12/AR2008081201249.html.

firings as the attorneys failed to aggressively pursue voter fraud, especially in voter registration in districts in which there were close elections.[67] Senator Edward Kennedy (D-MA) argued that the firings were a political move as "veteran prosecutors" were replaced with "political operatives" in important swing states before the 2008 elections.[68] Similarly to the impeachment of President Clinton, the nomination of Clarence Thomas, and the Court's decision in *Bush* v. *Gore*, this controversy exists as an ideological Rorschach test and its meaning depends on the terministic screens of the viewer.

Representation in the 1990s and 2000s

During the 1990s and the 2000s, the Supreme Court heard oral arguments in five different types of cases involving reapportionment and redistricting cases. The first set of cases involved the authority of the courts, citizens, and the state legislators to bring forth claims or hear claims.[69] In the second set of cases, the Supreme Court heard arguments that concerned whether or not redistricting plans diluted the voting strength of racial minorities and were, therefore, unconstitutional under Section 2 of the Voting Rights

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[67] David Johnson and Eric Lipton, "White House Said to Prompt Firing of Prosecutors," *The New York Times*, 13 March 2007 http://www.nytimes.com/2007/03/13/washington/13attorneys.html?pagewanted=1&_r=1&adxnnl=1&adxnnlx=1219612598-faVhSGqOXU8qdc5seRW0PA.

[68] Rick Klein, "Kennedy: Justice Firings are Keyed to '08 Vote," *The Boston Globe* 29 March 2007 http://www.boston.com/news/nation/washington/articles/2007/03/29/kennedy_justice_firings_are_keyed_to_08_vote/.

[69] These cases include *Growe* v. *Emison*, 507 U.S. 25 (1993); *United States v. Hays*, 515 U.S. 737 (1995); *C. Martin Lawyer, III,* v. *Department of Justice*, et al., 521 U.S. 567 (1997); *Darryl Sinkfield, et al.*, v. *Peggy C. Kelley*, et al., 531 U.S. 28 (2000).

Act.[70] In the third set of cases, the five of the Supreme Court Justices created an "Analytically Distinct" sub-section to the vote dilution claims under §2 of the *VRA* whereby the Justices applied strict scrutiny to majority-minority districts to discern if race, and not partisan interests or traditional districting principles, was the predominant factor in the creation of the those districts.[71] In the fourth category of cases the Supreme Court examined the concepts of pre-clearance and the meaning of retrogression under §5 of the *VRA*, attempting to separating claims of vote dilution from being interpreted under the purpose test of §5.[72] Finally, the Supreme Court heard oral arguments in a case that concerned partisan gerrymanders with a plurality of the Supreme Court declaring that partisan gerrymandering claims were not justiciable though a majority of the court failed to reach that consideration.[73] Throughout these categories, the Justices on the Court negotiated their views of the law and the political process to relieve the incongruities between the rhetorical tradition of voting rights and the new cases on districting.

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[70] *Growe* v. *Emison*, 507 U.S. 25 (1993); *Voinovich* v. *Quitler*, 507 U.S. 146, (1993); *Johnson* v. *DeGrandy*, 512 U.S. 997, (1994); *Abrams* v. *Johnson*, 521 U.S. 74 (1997); *L.U.L.A.C.* v. *Perry* 548 U.S. 399, (2006).

[71] *Shaw* v. *Reno*, 509 U.S. 630 (1993); *Miller* v. *Johnson*, 515 U.S. 900 (1995); *Shaw* v. *Hunt*, 517 U.S. 899 (1996) (*Shaw II*); *Bush* v. *Vera*, 517 U.S. 952 (1996); *Hunt* v. *Cromartie*, 526 U.S. 541 (1999); *Easley* v. *Cromartie,* 532 U.S. 234 (2001).

[72] *Reno* v. *Bossier*, 520 U.S. 471 (1997); *Reno* v. *Bossier*, 528 U.S. 310 (1997); *Branch* v. *Smith*, 538 U.S. 254 (2003); *Georgia* v. *Ashcroft*, 539 U.S. 431 (2003).

[73] *Vieth* v. *Jubelirer*, 541 U.S. 267 (2004) and *L.U.L.A.C.* v. *Perry* 548 U.S. 399, (2006). Please note: while there were only two cases in which plaintiffs or defendants brought forth partisan gerrymander claims, partisan politics permeated and polluted the cases involving the Voting Rights Act to the point where in *Cromartie I* and *Cromartie II* the Supreme Court ruled that partisan politics and not race were the predominant factor in the creation of the challenged districts. In *Shaw I*, *Shaw II*, *Miller* v. *Johnson, Bush* v. *Vera*, and *L.U.L.A.C.* v. *Perry*, the Supreme Court could have reach similar decisions about the role of partisan influence in the districting process as it did in *Cromartie I* and *Cromartie II*.

As the Supreme Court attempted to separate the cases according to categories, the decisions of the Supreme Court reflected incongruities within its own jurisprudence. For example, cases brought under §2 that protected against vote dilution for a politically cohesive group could reasonably extend to partisan gerrymandering cases though a majority of justices failed to make that extension to limit the judiciary's role in partisan politics. Though the judiciary allowed state legislators almost unlimited discretionary power to entrench legislators according to political affiliation, the Court rejected to offer state legislators unlimited discretionary power to entrench legislators according to developing majority-minority districts for political and racial cohesive groups. Where district irregularity is a sign of deviation and invidious discrimination in one set of cases, in another, irregular shapes present political choices by the state legislature in the give and take of politics.

Further exacerbating tension was the Court's decision in *Voinovich v. Quitler*, 507 U.S. 146, (1993), which held that a state could create majority-minority districts even without a §2 violation since a §2 violation occurred when an apportionment scheme denies "a protected class the equal opportunity to elect the candidate of choice," and remains voiceless over "majority-minority districts, districts dominated by certain political parties, or even districts based entirely on partisan political concerns."[74] Since the Ohio reapportionment plan did not deny the ability of racial minorities the ability to elect a candidate of its choice and, in fact, increased the ability of a group to elect a candidate of

[74] *Voinovich v. Quitler*, 507 U.S. 149, 155 (1993).

its choice, the Supreme Court allowed the creation of such districts, even if the motivation was to diminish the political influence of an opposing party, was a constitutional use of racial classification. Yet, in its decision, the Supreme Court overlooked some of the most important questions that the Court would face in its later decisions, such as to what degree race can serve as a proxy for politics in reapportionment? To what degree state legislatures can employ race to create districts? And to what degree state legislatures can diminish the influence of voting blocs by either cracking or packing voting blocs into districts? While Justice O'Connor acknowledged each of these questions, she declined to answer them as the parties did not raise these complaints. Instead, Justice O'Connor suggested these issues to future litigants who would raise these questions so the Court could answer them in a future case.

The Conflation of Racial and Partisan Gerrymanders

By the 1990s, the Supreme Court's ability to separate its jurisprudence on racial gerrymandering and partisan gerrymandering waned as competing political and ideological forces invented new ways to alter the districting process and found new ways to fight back against the Voting Rights Act. While the reforms of the Johnson Administration, such as the Great Society, the Civil Rights Act of 1964, and the Voting Rights Act of 1965— and its subsequent amendments— created a solid voting bloc of racial minorities for the Democratic Party, the Republican engaged in its own strategies of identity politics with the Southern Strategy and, its possibly less benign sub-strategy, the "Max Black Campaign." The conflation of racial and partisan politics emerged at a higher level during the North

Carolina *Shaw- Cromartie* cases and extended to the *Texas L.U.P.A.C. v. Perry* cases. The cases in these states showcased an ideological and political battle over the meaning of representation and ideological forces behind constitutional interpretation.

Throughout the 1990s and 2000s, the Shaw and Cromartie cases provide a representative anecdote about race and reconciliation, partisan politics and division. According to Tinsley E. Yarbrough in *Race and Redistricting: The Shaw-Cromartie Cases*, the North Carolina redistricting cases reveals a complex web of relations between competing actors over the scope of representation and constitutional interpretation between special private citizens, interest groups, state representatives, congressional representatives, the judiciary, and the Department of Justice. Further, the four North Carolina cases, present the limitations of the judiciary when handling reapportionment, the use of the law as an ideological force, and the limitations of the law to persuade citizens in society.

After the 1990 census, North Carolina received an additional Congressional seat. Since 40 of the state's 100 counties are covered by the Voting Rights Act, the North Carolina General Assembly submitted its reapportionment plan for review to the Attorney General and the Department of Justice. When designing the original plan, the Democratically dominated General Assembly desired to improve minority representation through the creation of one majority-minority district; however, in addition to increasing minority representation, which was important in the state as the state's electorate had not elected an African-American to Congress since George White retired from Congress in 1901, a majority in the General Assembly desired to protect Democratic incumbents.

Knowing that the vote of racial minorities throughout North Carolina voted heavily for Democrats, the General Assembly did not desire to thin out its support for the Democratic Party statewide by packing its voters into uber—safe majority-minority districts as the Ohio Republicans did in *Voinovich*.

After reviewing the North Carolina apportionment plan, the Department of Justice rejected the plan on the basis that the General Assembly did not create a second majority-minority district. In responding to the North Carolina General Assembly, John R. Dunne, the assistant attorney general in charge of the voting right's division, stated that the Department of Justice would not be able to, "preclear those portions of the plan where the legislature has deferred to the interests of the incumbents while refusing to accommodate the community of interest shared by insular minorities,... or where the proposed plan, given the demographics and racial concentrations in the jurisdiction, does not reflect minority voting strength."[75] When receiving word of the rejection, state Republicans, as well as the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP), cheered the DOJ's rejection of the General Assembly's plan since it did not provide enough representation for the racial minorities in North Carolina. Even though the state Republicans refused to support the recognition of a paid, state holiday celebrating the life of Martin Luther Kin Jr., they supported the development of a second majority-minority district in North

[75] Tinsley E. Yarbrough, *Race and Redistricting: The Shaw-Cromartie Cases*, (Lawrence: The University of Kansas Press, 2002), 17.

Carolina.[76] Since the ruling of a required second majority-minority district based on the proportionality of the state's demographics, which stood in sharp contradiction to Section 2's prohibition of proportional representation, the state Democrats argued that the Republican DOJ's rejection constituted a political strategy to diminish the electoral strength of Democrats throughout North Carolina. The North Carolina Democrats complained that this DOJ's based its rejection on the Bush Administration's "Max-Black Campaign," orchestrated by Republican National Committee counsel Ben Ginsburg to support the over-packing of minorities into majority-minority districts, which diminished the state-wide electoral support of Democrats and, consequently, allowing white voters the chance to elect Republicans to office.[77] A further consequence of this strategy, as what occurred in the Texas redistricting fiasco orchestrated by Rep. Tom Delay, was the branding of the two parties in the minds of the electorate whereby, as Steve Bickerstaff writes, the Republicans desire to marginalize the Democrats as a "party exclusively for losers, liberals, and racial minorities."[78] By engaging in this form of identity politics, Republicans intended to "increase the likelihood that undecided Anglo voters see a racially defined Democratic Party as inhospitable to Anglo voters and officeholders," ensuring those voters would voter Republican.[79] As Steve Bickerstaff notes, though this

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[76] Tinsley E. Yarbrough, *Race and Redistricting,* 19.

[77] Tinsley E. Yarbrough, *Race and Redistricting,* 17.

[78] Steve Bickerstaff, *Lines in the Sand: Congressional Redistricting in Texas and the Downfall of Tom Delay,* (Austin: University of Texas Press, 2007) 4.

[79] Steve Bickerstaff, *Lines in the Sand*, 4.

may not be the intent of Republican lawmakers as they dispute this was a goal of redistricting in Texas, few of those Republicans dispute the effects of this type of redistricting.[80]

After acquiescing to the Department of Justice, the North Carolina General Assembly created a second majority-minority district. However, rather than create the district in the southeast portion of the state, a move which would have threatened Democratic incumbents, the General Assembly created the "irregularly-shaped" District 12 in the north central portion of the state, which stretched for 150 miles along the I-85 corridor and was no wider than the corridor. Opponents of the district focused on the aesthetics of the district as a sign of its unconstitutionality: John Dunne stated the majority-minority districts were "Ugly as Hell;" a state legislator remarked, "if you drove down [Interstate 85] with both car doors open, you'd kill most of the people in the district;" the Wall Street Journal called it "Political Pornography" and noted that "in one county, northbound drivers on I-85 would be in the 12th district, but southbound drivers would be in another. The next county over, the districts would 'change lanes'" and that candidates would campaign by having, "rallies at every exit along I-85."[81]

Even though Republican-appointed officials at the DOJ approved the General Assembly's plan, state Republicans in North Carolina challenged the plan as being a partisan gerrymander as the redistricting plan packed Republican voters into two districts

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[80] Steve Bickerstaff, *Lines in the Sand*, 4.

[81] Tinsley E. Yarbrough, *Race and Redistricting,* 17.

to improve the electoral success of Democratic incumbents. Along with Republican House Member J. Arthur Pope and 41 aggrieved voters, Jack Hawke, the North Carolina GOP state party chairman, filed suit against the redistricting plan and declared, like all others that oppose a particular redistricting plan:

> We have government that is supposed to be based upon the principles of government for the people, by the people, for the people. But what the General Assembly of North Carolina has done is created government of the Democratic incumbents, by the Democratic incumbents, for the Democratic incumbents.... Drawing district lines in this manner to protect incumbents turns the whole system upside down. Instead of voters choosing their representatives, they representatives are choosing their voters. This is undermining, in my opinion, the whole fabric of the representative form of government.[82]

In *Pope* v. *Blue*, 1991, a three-judge district court dismissed the claims of partisan gerrymander in light of *Bandemer* v. *Davis*, claiming that the North Carolina Republicans did not prove how this redistricting plan possessed the intent and effects of discrimination against Republicans in North Carolina since no elections were carried out under the plan and since it was created with the help of Republicans in order to provide safe seats for Republicans. On appeal, the Supreme Court affirmed the decision of the lower court.

While the General Assembly's apportionment plan survived against partisan gerrymandering claims brought forth by state Republicans, it did not survive in this form

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[82] Tinsley E. Yarbrough, *Race and Redistricting,* 17.

against racial gerrymandering claims brought forth by concerned moderate-Democratic citizens. After the Supreme Court affirmed the district court's decision in *Pope* v. *Blue*, 809 F. Supp. 392 (1992), 113 S. Ct. 30 (1992), Robinson Everett, his song Greg Everett, Ruth Shaw, and Melvin Shimm challenged the General Assembly's reapportionment in federal court because as they looked at the contorted majority-minority districts they believed that those districts represented the racial problems from Mississippi during the 1870s, when the state submerged minorities into one district to ensure a diminished voice in the electoral process; or of Alabama in the 1950s – 1960s, when the town of Tuskegee redistricted almost all African-American residents out of the city limits to ensure they would not receive municipal services; or of Kentucky during the 1980s, when potential jurors, most of whom were black, could be excluded from service peremptorily.[83] Everett and his colleagues argued that the North Carolina redistricting plan created an unconstitutional system of proportional representation as is packed voters into two districts with no regard to the traditional principles of compactness, contiguity, or respecting political boundaries; the DOJ trampled on state sovereignty as it coerced the North Carolina General Assembly into action; and, consequently, the reapportionment plan abridged North Carolinians' right to vote as the electoral process is a color-blind

[83] Tinsley E. Yarbrough, *Race and Redistricting*, 4 – 5, 33. In addition to the problems with race, the group challenged the district because of their affirmative action over merit-based programs, the extension of the VRA in ways that were not constitutional, the belief that racial minorities did not need electoral majorities to elect a candidate, and because of the intrusion of federal power into areas of law traditionally handled by the states (24 – 51).

process.[84] The district court did not agree. However, Everett persuaded the Supreme Court. In a 5 – 4 decision, Justice O'Connor ruled that the districting was so irrational on its face it could only be understood as an attempt by the state legislators to segregate the voters.[85] Consequently, the Supreme Court remanded the case back to the North Carolina district court for future proceedings.

After the Supreme Court agreed to hear what would become *Shaw I*, Everett received additional support for his cause from the national Republican Party, The Washington Legal Foundation, former Senator of North Carolina Jesse Helms, the American Jewish Congress, the Equal Opportunity Foundation financed by Richard Mellon Scaiffe, and five Supreme Court Justices who agreed with his position.[86] On remand in light of *Shaw I*, the North Carolina District Court ruled that state legislators relied on race to create the district thought it survived strict scrutiny as the district was narrowly tailored to achieve a legitimate state interest.[87] However, in light of its recent decision in *Miller* v. *Johnson*, the Supreme Court ruled that race was the predominant motive in the creation of the district and, therefore, could not survive strict scrutiny,

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[84] Tinsley E. Yarbrough, *Race and Redistricting,* 35.

[85] *Shaw* v. *Reno*, 509 U.S. 630, 652 (1993).

[86] Tinsley E. Yarbrough, *Race and Redistricting,* 54 – 58. To defend the position of North Carolina, the Democratic National Committee, the Lawyer's Committee for Civil Rights under Law, the ACLU, the Mexican American Legal Defense and Educational Fund (MALDEF), and the NAACP filed amicus briefs (59).

[87] *Shaw* v. *Hunt*, 517 U.S. 899, 902 (1996). The Supreme Court heard oral arguments for Bush v. Vera on the same day as Shaw II. Likewise, the Supreme Court handed down both decisions on June 13th, 1996. In both rulings, the Supreme Court released 5 – 4 opinions that held race was the predominant factor in redistricting.

forcing the state legislators to engage in an undesired redistricting session.[88] Whereas in the partisan redistricting cases a majority of the Court refused to answer how much is too much partisanship, they were more than willing to answer how little is too little compactness, even if they were willing to overlook the partisan aspects of the case and not reply the requirement of compactness to all redistricting cases.

Yet, after *Shaw II*, the challenges did not end. By the time the Supreme Court struck down its districts in *Shaw II*, North Carolina possessed a divided government that desired to what was best for both parties. After developing a new plan and revamping the bizarre District 12 so it was not as bizarre, Martin Cromartie, a friend of Robinson Everett and a believer in the color-bind Constitution, challenged the district.[89] This challenge would lead to two more Supreme Court decisions, *Hunt* v. *Cromartie*, 526 U.S. 541 (1999), in which the Supreme Court ordered the trial court to conduct a rehearing on the district in question,[90] and *Easley* v. *Cromartie*, 532 U.S. 234 (2001) in which the Supreme Court held that the lower courts findings were clearly erroneous and that partisan, not racial, considerations was the predominant factor.[91] The decision in *Easley* v. *Cromartie*, 532 U.S. 234 (2001) is controversial for two reasons. First, the unconfirmed rumor surrounding the case is that Justice O'Connor switched her opinion at the last moment, moving from the

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[88] *Shaw* v. *Hunt*, 517 U.S. 899, 905 (1996).

[89] Tinsley E. Yarbrough, *Race and Redistricting*, 35.

[90] *Hunt* v. *Cromartie*, 526 U.S. 541, 553 – 554 (1999).

[91] *Easley* v. *Cromartie*, 532 U.S. 234, 243 - 258 (2001).

Conservative to Liberal side.[92] This switch may have occurred because she empathized with the legislative process or because, in his dissent, Justice Thomas called for the adoption for a color-blind constitution, which Justice O'Connor did not desire. According to J. Morgan Kousser, Justice O'Connor's ideological commitment to a color-blind Constitution depended on the interests of the Republican Party[93] and, in *Cromartie I*, Republicans could have lost seats by redrawing the plan. Second, in the decision, the Justices argued over a question of evidence as both sides relied on expert testimony to argue their position as the witness for Cromartie argued on the basis of voter registration and that race was the predominant factor and the expert for Easley on the actual voting patterns and that partisan interests were the predominant factor. The trial court relied on the first expert, possibly because of ideological reasons as two of the three judges object to race-conscious districting. Yet, a majority on the Supreme Court found the actual voting record more persuasive. However, while the evidence may have been more persuasive to the majority, it did not mean that the data from the first expert was clearly erroneous.[94] Like other aspects of the *Shaw* and *Cromartie* cases, the debate over evidence reflected an ideological argument over constitutional interpretation and the political process.

The ideological, partisan, and racial struggle between the competing factions occurring in the *Shaw* and *Cromartie* cases is similar to battles in other Southern States

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[92] Tinsley E. Yarbrough, *Race and Redistricting,* 190.

[93] J. Morgan Kousser, *Color-Blind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction*, (Chapel Hill: The University of North Carolina Press, 1999), 437.

[94] *Easley* v. *Cromartie*, 532 U.S. 234, 259 (2001). Justice Thomas objects to the rejection of the evidence on which the trial court based their opinion.

subject to the VRA. For example, in Georgia, the Supreme Court struck down a districting plan in *Miller* v. *Johnson*, 515 U.S. 900 (1995) on the basis that race was the predominant motive behind the redistricting. In *Abrams* v. *Johnson*, 521 U.S. 74, (1997) the Supreme Court struck down another attempt by the state legislators to draw two majority-minority districts on the grounds that race was the predominant motive in drawing the districts. In *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003) the Supreme Court would hand down its third decision concerning the voting rights of minorities with the Conservative majority controlling this decision as well. In cases from Texas, the Supreme Court refused to hear a court concerning the partisan nature of its 2004 redistricting plan though it did hear *L.U.L.A.C.* v. *Perry*, 548 U.S. 399 (2006), which concerned racial vote dilution to secure partisan interests. In a 5 – 4 decision, Justice Kennedy switched sides to join the Liberal Justices because of the political overtones of the case and the perceived threat to enactment of representative democracy.

Reapportionment as a Source for Reconciliation

In the 1995 article "Our Separatism?" Pamela S. Karlan writes while the world witnessed the break-up of multi-ethnic states into balkanized states, the United States Supreme Court believed that it saw the same political fragmentation along ethnic and racial lines in its racial gerrymandering cases.[95] Because of the elements of racial fragmentation in the political realm, the Justices on the Supreme Court incorporate the language of separatism into the redistricting cases during the 1990s, discussing racial

[95] Pamela S. Karlan, "Our Separatism? Voting Rights as an American Nationalities Policy," *The University of Chicago Legal Forum* (1995): 83 – 109.

gerrymandering in terms of "political apartheid" and "balkanization." Rather than treat voters as members of a politic groups and allow state legislators to segregate these groups, the majority of the Supreme Court argue that in order to establish the political foundation for reconciliation between competing races and ethnicities, the Supreme Court ought to treat voters as individuals rather than accept racial stereotypes and strike down redistricting legislation that unnecessarily divide citizens into segregated electoral districts.[96] Conversely, the dissenting Justices argue that if state legislators allow racial minorities access to political participation where they can establish political equality, then it will be easier to develop- he electoral foundation for political reconciliation, preventing the development of the United States of fracturing into balkanized states.

In the vote dilution, "analytically distinct," and partisan gerrymandering cases, the Supreme Court reengages itself over the meaning of representation, who is to be represented, and how the people are to be represented. While working within the framework of the Warren Court's vision of political equality, the Conservative majority of Chief Justice William Rehnquist, Justice Sandra Day O'Connor, Justice Antonin Scalia, and Justice Anthony Kennedy, and after their appointments Chief Justice John Roberts and Justice Samuel Alito, recreate the meaning of democracy to focus on an individual and not group interpretation of representation. Fairness, the Conservative Justices maintain, develops when the State respects the individual and equal protection means

[96] The majority in these cases include Chief Justice William Rehnquist, Justice Sandra Day O'Connor, Justice Antonin Scalia, Justice Anthony Kennedy, and Justice Clarence Thomas. The dissenting Justices include Justice Stevens, Justice Souter, Justice Ginsburg, and Justice Breyer.

that the state treats the individual as an individual rather than stereotyping the individual as a member of a political or racial group. Conversely, the liberal minority of the Court, consisting of Justice John Paul Stevens, Justice David Souter, Justice Ruth Bader Ginsburg, and Justice Stephen Breyer desire to protect the ability of political cohesive groups to engage in the democratic process. Rather than considering votes in the abstract, the liberal justices examine the voting records of the individuals and argue that political fairness occurs when the government remains neutral to voters. Further, for the liberal justices equal protection means that the state ought to treat racial and ethnic groups alike and not diminish a group's voter power and influence because of its race or party affiliation.

Reconciliation and the Citizen

Throughout the "Analytically Distinct" decisions, the Conservative Justices, especially the decisions by Justice O'Connor and Justice Kennedy, advance the proposition that the best means to achieving racial reconciliation, or the best means to alleviate racial tension, is to promote a vision of representation where the individual and, not the racial group, is the foundation of representative government. Like the Justices on the Warren Court who ushered in the Reapportionment Revolution believing in a telos of political equality, the current Conservative majority argues that the Constitution possesses a telos of reconciliation. Yet for this reconciliation to occur, government must treat the citizens as individuals, and by doing so, the hope is that individuals will treat each other as individuals.

For Justice Kennedy, while the Voting Rights Act has reduced the electoral problems for racial minorities in the electoral process, there is a limitation on what the law can do to reach the telos of reconciliation since racial classifications prevent that accomplishment. In *Miller* v. *Johnson*, Justice Kennedy writes:

> Only if our political system and our society cleanse themselves of that discrimination will all members of the polity share an equal opportunity to gain public office regardless of race. As a Nation we share both the obligation and the aspiration of working toward this end. The end is neither assured nor well served, however, by carving electorates into racial blocs. "If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury."[97]

Perpetuating racial stereotypes in the electoral process prevents the ground on which reconciliation can form as it balkanizes rather than integrates. In keeping with the spirit of *Brown*, integration in the individual level and not segregation on the group level leads to reconciliation, even in regards to the Voting Rights Act: "It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids."[98] Consequently, if the Supreme

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[97] *Miller* v. *Johnson*, 515 U.S. 900, 927 (1995). The quote is this passage is from *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 630-631, 114 L. Ed. 2d 660, 111 S. Ct. 2077 (1991).

[98] *Miller* v. *Johnson*, 515 U.S. 900, 927 – 928 (1995).

Court justice can establish that the ideology of reconciliation concerns through the individual rights view of representation, the by cleansing the language of representation and removing the notion of group rights, especially for racial minorities, the reconciliation process can occur.

Preventing Reconciliation: The Harms of Representation

For the Conservative Justices in the racial gerrymandering cases, especially the "analytically distinct" subsection to the vote dilution cases, the starting point concerning the relationship between the individual and the state begins with the Equal Protection Clause's guarantee that no state shall deny any person within its jurisdiction the equal protection of the law. According to Justice O'Connor in *Shaw I*, the central purpose of the Equal Protection Clause, "is to prevent the state from purposefully discriminating between individuals on the basis of race. Laws that explicitly distinguish between individuals on racial grounds fall with the core of that prohibition."[99] While not all racial classifications are unconstitutional, when the state classifies its citizens based on their race, the judiciary must apply strict scrutiny since these classifications are constitutionally suspect.[100] Even when the state employs a classification to benefit a protected class, the judiciary must impose judicial skepticism on the classification to avoid the appearance that the classification demeans individuals by treating them as a member of a group rather than as

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[99] *Shaw* v. *Reno*, 509 U.S. 630, 642 (1993). See also Chief Justice Rehnquist's opinion in *Shaw* v. *Hunt*, 517 U,S, 899, 907 - 908 (1996) (Shaw II): "Racial classifications are antithetical to the Fourteenth Amendment, whose 'central purpose' was 'to eliminate racial discrimination emanating from official sources in the States." *McLaughlin* v. *Florida*, 379 U.S. 184, 192, 13 L. Ed. 2d 222, 85 S. Ct. 283 (1964)."

[100] See Justice Kennedy in *Miller* v. *Johnson*, 515 U.S. 900, 904 – 905 (1995).

an individual since racial classification, "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.....They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility."[101] As John Hart Ely notes from the perspective of a legal formalist, the fifteenth amendment requires that "no one person's vote is to be intentionally made less effective than another's because of race or color."[102] Since race, unlike partisan affiliation, is an immutable characteristic, it should receive higher scrutiny from the state.

However, since all redistricting acts concern the classification of voters into some group[103] and since state legislators rely on the census material and voter records available at the precinct and district level available from the Census Bureau[104] to make assumptions that the voters will cast votes for a particular political party, religion, ethnic group, or race,[105] the issue in the "analytically distinct" cases concern the way in which state legislators rely on race to create electoral districts. As Justice O'Connor notes in *Shaw I*, "race consciousness redistricting is not always unconstitutional," and the "Court has never held that held that race-conscious state decision-making is impermissible in all

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[101] *Shaw* v. *Reno*, 509 U.S. 630, 643 (1993). Here, Justice O'Connor quotes from *Hirabayashi* v. *United States*, 320 U.S. 81, 100, 87 L. Ed. 1774, 63 S. Ct. 1375 (1943), and *Loving* v. *Virginia*, 388 U.S. 1, 11, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967).

[102] John Hart Ely, "Gerrymanders: The Good, the Bad, The Ugly," *Stanford Law Review* 50 (1998): 632.

[103] *Miller* v. *Johnson*, 515 U.S. 900, 947 (1995).

[104] *Bush* v. *Vera*, 517 U.S. 952, 1031 (1996). See footnote 18.

[105] *Shaw* v. *Reno*, 509 U.S. 630, 660 and 678 (1993).

circumstances."[106] While the use of race is permissible for some classifications, the Conservatives Justices forbid the state legislatures to create certain districts with race as the "predominant factor," especially when the legislature subordinates traditional districting principles i.e. disregarding compactness, disrespecting political boundaries, and ignoring communities of interest, to create irregularly shaped districts that can only be understood based on race.[107] The concern in the "analytically distinct" cases, especially for Justices O'Connor and Justice Kennedy, is if there is an express harm in the classification, ensuring the Supreme Court must analyze the case to see if the classification is benign or malign, which must be found by determining the communicative message that the district sends to the citizens of the state. Again, the issue is not over political equality or the weight of a vote but that some voters have been subjected to a racial classification and feel the "expressive" injury due to segregation or separation by the hands of the state. [108]

According to the Conservative Justices, the harm in these cases is communicative as the creation of the districts sends a message to citizens in society, inflicting as psychological and an emotional messages about the citizens of the state and the process leading to the

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[106] *Shaw* v. *Reno*, 509 U.S. 630, 642 (1993). Note: While Chief Justice Rehnquist, Justice Scalia, and Justice Thomas categorically reject the use of race as a classification, Justices O'Connor and Justice Kennedy support the use of race in redistricting cases, as well as affirmative action cases. For Justice O'Connor see her opinion in *Grutter* v. *Bolinger*, 539 U.S. 306 (2003) and for Justice Kennedy see his opinion in *Parents Involved in Community Schools* v. *Seattle School Dist.* NO. 1 ___ U.S. ___ (2007). In *Parents Involved,* Chief Justice Roberts articulates a color-blind reading of the constitution, which would eliminate the use of racial classifications. While note writing an opinion, Justice Alito sides with Chief Justice Roberts, and Justices Scalia and Thomas.

[107] *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995).

[108] Jeffrey L. Fisher, "The Unwelcome Judicial Obligation to Respect Politics in Racial Gerrymandering Claims," *Michigan Law Review* 95 (1997): 1405.

creation of the district. Representational harm, according to Justice O'Connor, occurs when state legislatures develops a district, "solely to effectuate the perceived common interests of one racial group," since the elected officials from that district would be "more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy."[109] With the concept of "representational" harm, Justice O'Connor argues constituents ought to prefer substantive representation rather than just descriptive representation, which supports the idea that that representative will represent the community rather than just a community within the district. [110] Further, representational harm creates a "stigmatic" harm, meaning that the communicative act of districting sends a message that "race-based line-drawing may promote racial hostility."[111] As John Hart Ely notes, under this conception of representation, the injury occurs as the

[109] *Shaw* v. *Reno*, 509 U.S. 630, 16 (1993); See also *United States* v. *Hays*, 515 U.S. 737, 744 – 745 (1995): "Where a plaintiff resides in a racially gerrymandered district, however, the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action. Voters in such districts may suffer the special representational harms racial classifications can cause in the voting context." Of course, in *Sinkfield* v. *Kelly*, 531 U.S. 28 (2000), voters white voters residing in an adjacent district could not challenge a majority-minority district since they could not prove that the state classified voters based on race to create their district, even though the drawing of the majority-minority may have effected their district.

[110] *Shaw* v. *Reno*, 509 U.S. 630, 648 (1993). According to Kenneth Burke, the trope of irony concerns the integration of all of the voices into one whereas the trope of metonymy acts as a reduction to reduce the potential voices in terms of only the voice of the predominant group. Kenneth Burke, *A Grammar of Motives*, (Berkeley: University of California, 1969), 505 – 512.

[111] *Shaw* v. *Hunt*, 517 U.S. 899, 927 (1996). "Stigmatic" harm develops from the Supreme Court's decision in United States v. Hays, 515 U.S. 744 – 745 and *Shaw* v. *Reno*, 509 U.S. 630, 646 – 649 (1993).

state legislators fill the remainder of the district with people whose vote and political influence will not count or possess meaning solely based on race.[112]

Throughout the "analytically distinct" cases, there are three consequences of "representational harm." First, according to Justice O'Connor the racial classifications in *Shaw* treat certain members of the political community as "outsiders" or as "others." To accentuate this claim, Justice O'Connor adopts the language of segregation, writing that the reliance on racial classifications to create bizarrely drawn districts, "pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions."[113] Further, Justice O'Connor calls the district in question "political apartheid," and locates discussion of the contested district in relation to the ghosts of segregation past, such as districts in Mississippi during reconstruction, *Gomillion* v. *Lightfoot* and other racial gerrymandering cases, *Loving* v. *Virginia,* and *Brown* v. *Board of Education.*[114] She notes, "that argument [of unconstitutional racial gerrymandering] strikes a powerful historical chord: It is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of

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[112] John Hart Ely, "Standing to Challenge Pro-Minority Gerrymanders," *Harvard Law Review* 111 (1997): 585

[113] *Shaw* v. *Reno*, 509 U.S. 630, 658 (1993).

[114] *Shaw* v. *Reno*, 509 U.S. 630, 638 – 644 (1993). Justice O'Connor notes that during reconstruction, state legislators packed minorities into a "shoe-string" district, allow white majorities to control the other five districts.

the past."[115] Showing similar concerns in *Miller* v. *Johnson*, Justice Kennedy describes the use of race as the predominant factor in the districting process as the official policy of segregation in the state where there is no difference between the creation of majority-minority districts to improve the political equality of racial minorities within the state and the official policies of segregation in the past: "Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks… buses… beaches… schools… so did we recognize in Shaw that it may not separate its citizens into different voting districts on the basis of race."[116]

The rhetorical strategy to highlight the harm of segregation does not concern examining whether or not the representative is responsive to all of his or her constituents but to challenge the design and aesthetics of the district. By employing a metaphor that creates the greatest visual dissonance between the district and the concept of representation but overlooking the actual representation occurring in the district, those challenging the plan highlight the irrationality of the plan and, therefore, the segregation within the district. For example, in *Shaw I*, Justice O'Connor writes that of the two majority-minority districts, District 1 is "hook shaped. Centered in the northeast portion of the State, it moves southward until it tapers to a narrow band; then, with finger-like

[115] *Shaw* v. *Reno*, 509 U.S. 630, 642 (1993).

[116] *Miller* v. *Johnson*, 515 U.S. 900, 912 (1995). Full Quote, with cases: "State has used race as a basis for separating voters into districts. Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, *New Orleans City Park Improvement Assn.* v. *Detiege*, 358 U.S. 54, 3 L. Ed. 2d 46, 79 S. Ct. 99 (1958) (per curiam), buses, *Gayle* v. *Browder*, 352 U.S. 903, 1 L. Ed. 2d 114, 77 S. Ct. 145 (1956) (per curiam), golf courses, *Holmes* v. *Atlanta*, 350 U.S. 879, 100 L. Ed. 776, 76 S. Ct. 141 (1955) (per curiam), beaches, *Mayor of Baltimore* v. *Dawson*, 350 U.S. 877, 100 L. Ed. 774, 76 S. Ct. 133 (1955) (per curiam), and schools, *Brown* v *.Board of Education*, 347 U.S. 483, so did we recognize in Shaw that it may not separate its citizens into different voting districts on the basis of race."

extensions, it reaches far into the southernmost part of the State near the South Carolina border. District 1 has been compared to a "Rorschach ink-blot test" and a "bug splattered on a windshield." Further, when describing District 12, Justice O'Connor writes:

> It is approximately 160 miles long and, for much of its length, no wider than the I-85 corridor. It winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas "until it gobbles in enough enclaves of black neighborhoods." Northbound and southbound drivers on I-85 sometimes find themselves in separate districts in one county, only to "trade" districts when they enter the next county. Of the 10 counties through which District 12 passes, 5 are cut into 3 different districts; even towns are divided. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them. One state legislator has remarked that "'if you drove down the interstate with both car doors open, you'd kill most of the people in the district.'" The district even has inspired poetry: "Ask not for whom the line is drawn; it is drawn to avoid thee."[117]

The description of the first district contains images of a person manipulating tracks of land for personal gain and images of violence, even if against insects. The description for

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[117] *Shaw* v. *Reno*, 509 U.S. 630, 636 (1993). The decision in *Bush* v. *Vera* discusses the district in terms of violent and unnatural representational imagery. In that decision, two districts in the Houston area are described as being "like a jigsaw puzzle . . . in which it might be impossible to get the pieces apart."[117] One district, Justice O'Connor discusses, is similar to, "A sacred Mayan bird, with its body running eastward along the Ship Channel from downtown Houston until the tail terminates in Baytown. Spindly legs reach south to Hobby Airport, while the plumed head rises northward almost to Intercontinental. In the western extremity of the district, an open beak appears to be searching for worms in Spring Branch. Here and there, ruffled feathers jut out at odd angles." See *Bush* v. *Vera*, 517 U.S. 952, 974 (1996).

District 12 continues the imagery of violence by focusing on snakes that devour "black neighborhoods" and the ability to "kill" the members of the district by "opening the car doors." The reference to For *Whom the Bells Toll* also provides a subtext for a discussion of death. With such images of violence, accountable representation must not be possible.

In providing these descriptions, the Justice O'Connor raises concern over the psychological anxiety developed through the aesthetics of the district, providing motive to alter the district.[118] The metaphors not only provide signs that the district is unnatural for a democratic government, it also possess an argument that the districts will be violent for the citizens who live in those districts, continuing the harm that segregation caused in the past. Connecting the images of violence with a discussion of rationality, balkanization, and political apartheid, the Conservative Justices argue that political identity on the basis of race would perpetuate the harms of the past, especially in unnatural districts. Deviations from "traditional districting principles,"—which during oral arguments in *Vieth* the Justices argued that those traditional principles are far form objective or neutral, especially in regards to the way in which they are selected[119]— "cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial…. cutting across pre-existing precinct lines and other natural or traditional divisions,

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[118] See Kenneth Burke *A Rhetoric of Motives*, (Berkeley: University of California Press, 1969), 10, for a discussion of killing and transformation as revealing a motive.

[119] Transcript of Oral Argument, *Vieth v. Jubelirer*, (2003) (No. 02-1580). During the oral arguments, the lawyer for Jubelirer, John P. Krill Jr., argued, "There are no neutral criteria. Name a criterion and I'll show you why it represents a political choice." Justice Scalia concurred with these sentiments as he stated, "Of course, I guess if there are five different criteria: compactness, past practice, or whatever, it's very much a political call which of the five criteria you decide to… to use."

is not merely evidentially significant; it is part of the constitutional problem insofar as it disrupts nonracial bases of political identity and thus intensifies the emphasis on race."[120] To combat the bizarrely drawn districts and to prevent the development of political identity based on race, the Supreme Court possesses a moral obligation to strike down the districts.

The second type of communicative harm that the Justices convey in the "analytically distinct" discusses a normative aspect of representation where the representative is virtual and not actual for the citizens who are not of the same race as the representative. Because the bizarrely-drawn majority-minority districts develop on account of race as the predominant factor, the concern for Justice O'Connor is that the representative government provided will be virtual and not actual, meaning the representative will not consider, on principle, the views or interests of all if the constituents but only the views and interests of whom he or she is a part. As Justice Kennedy states in *Miller* v. *Johnson*, the classification by race is more likely to "reflect racial prejudices than legitimate public concerns; the race, not the person, dictates that category."[121]In *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003), Justice O'Connor would rely on Hanna Fenichel Pitkin to argue, dismissively and paternalistically, that these district employ descriptive representation rather than the preferred substantive representation, diminishing the ability of the group to exert influence in multiple districts and preventing

[120] *Bush v. Vera*, 517 U.S. 952, 980 (1996).

[121] *Miller* v. *Johnson*, 515 U.S. 900, 912 (1995).

them from establishing coalitions.[122] By adopting the second approach, minority groups can reduce the "balkanization" of racial minorities and increase their chances at electing candidates of choice.[123]

Conversely, by resisting the formation of influence districts as desiring the formation of majority-minority districts, the concern is that majority-minority districts for any type of minority will divide the electorate and lead to resentment for other groups. In *Wright* v. *Rockefeller*, one of the first cases to reach the Supreme Court concerning racial gerrymandering, Justice William O. Douglas challenged the Supreme Court for allowing state legislators to create districts based on the racial classifications of the people. Quoting Justice Douglas from *Wright* v. *Rockefeller,* Justice O'Connor states:

> Racial electoral registers, like religious ones, have no place in a society that honors the Lincoln tradition - "of the people, by the people, for the people." Here the individual is important, not his race, his creed, or his color.] Here the individual is important, not his race, his creed, or his color. The principle of equality is at war

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[122] *Georgia* v. *Ashcroft*, 539 U.S. 461, 481 (2003). In this section of her decision, Justice O'Connor relies on the work of Hanna Fenichel Pitkin to discuss these two competing conceptions of representation. See Hanna Fenichel Pitkin, *The Concept of Representation*, (Berkeley: The University of California Press, 1967), 60 – 91.

[123] In her decision, Justice O'Connor relies on the following evidence to suggest that influence districts increase the ability of "substantive representation": Lublin, Racial Redistricting and African-American Representation: A Critique of "Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?" 93 *Am. Pol. Sci. Rev.* 183, 185 (1999) (noting that racial redistricting in the early 1990's, which created more majority-minority districts, made Congress "less likely to adopt initiatives supported by blacks"); Cameron, Epstein, & [*483] O'Halloran, Do Majority-Minority Districts Maximize Substantive Black Representation in Congress? 90 *Am. Pol. Sci. Rev.* 794, 808 (1996) (concluding that the "districting schemes that maximize the number of minority representatives do not necessarily maximize substantive minority representation"); C. Swain, Black Faces, Black Interests 193-234 (1995); Pildes, 80 *N. C. L. Rev.*, at 1517; Grofman, Handley, & Lublin, Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence, 79 *N. C. L. Rev.* 1383(2001) (482 – 483).

> with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. . . . That system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense.[124]

The concern for Justices Douglas is that if the state creates a district for one specific group of voters in mind then the state would not keep its constitutional promise to all citizens within that district as it would favor some but discriminate against others. Consequently, the state would possess the power to balkanize voters according to an overarching category, some changeable others immutable, and, in the process, enhance the voting rights of some and diminish the voting rights of others but creating political tension between the groups. Further, because of the use of ethnic and racial categories, the voters may develop a political backlash against the group receiving "special" treatment, diminishing the ability of competing factors to unite based on qualifications other than electoral or communal issues. In some cases such as partisan affiliation or religion, the individual voters would be able to switch allegiances. However, to do so would violate the liberty of conscience of the individual sending a generic societal message that in order to live within a specific district, the religion or this ideology is the most important characteristic deciding an election. While discussing tax increases or decreases is applicable for an election, discussions of which religion leads to eternal salvation is not the proper argumentative field for an

[124] *Shaw* v. *Reno*, 509 U.S. 630, 16 (1993); *Wright* v. *Rockefeller*, 376 U.S. 52, 66 - 67 (1964). In *Wright*, the New York State Legislature drew lines, according to Justice Douglass, that zigzagged throughout Manhattan to create a district containing African-Americans and Puerto Ricans.

election. For Justice Douglas, this state coercion violates the democratic ideal whereby the individual possesses fewer rights than the majority.

In *Shaw I*, Justice O'Connor employs Justice Douglas' conception of the individual to stress the representational harm in District 12, which stretched for 600 miles along I-81. Like Justice Douglas, Justice O'Connor believes that the state should avoid districts that classify voters based on race, reinforcing "racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group, rather than their constituency as a whole."[125] Just through the creation of a majority-minority district that does not follow traditional districting principles send a societal-wide message that all residents of the state receive and interpret in the same fashion. To prevent citizens being treated differently or being discriminated against by a general classification, the judiciary places itself in position to declare a generalized interpretation of what the message must mean to all voters. Whether or not one resides in the district, which is the requirement of *Hays*, would be unnecessary to challenge the district as all members of the state, would receive the same message. Further, Justice O'Connor restricts the message to just race though other conditions, such as partisan affiliation or religion, would create the same effect: that the voter who is not part of the specified group would receive the message from the elected official that he or she would not receive the same representation as the other members, consequently

[125] *Shaw* v. *Reno*, 509 U.S. 630, 18 (1993). In *Shaw I*, Justice Souter argues against Justice O'Connor's notion of representational harm, stating that there is no harm losing elections. If there were, then voters would suffer the same harm on partisan gerrymandering claims. In response, Justice O'Connor shifts the burden of proof by stating that Justice Souter does not explain why these claims are not cognizable under the fourteenth.

stigmatizing the outside in the process. Further, if this message were to occur naturally, as it occurs in Harlem or the Bronx, the message would be fine; however, since the state imposed this message unnaturally by ignoring traditional districting principles, this message overrides the state's flexibility in creating communities of interest, regardless of whether or not those communities occur in states where racially polarized voting and racial appeals in elections may be the unfortunate norm.

Third, as Richard H. Pildes and Richard G. Nieme argue, the problem with the irregularly shaped majority-minority districts is that they reflect a problem over a perceived element of corruption in the districting process. Pildes and Nieme state that the problem of bizarrely-draw districts reflects a constitutional problem of value reductionalism in public policy, where there is an apparent corruption of a decision-making process since decision—makers reduce a process that ought to contain multiple layers to allow only one value to dominate the process.[126] Consequently, public perception, rather than constitutional precedent, guides the decision-making process and, in a process whereby legislative redistricting should include traditional factors such as effective representation for communities of interest, the political boundaries of existing jurisdictions, and geographical boundaries that provide efficient campaigning and close connections between the representatives and their citizens, the bizarrely-drawn district reveals that the use of race trumps these other traditional concerns.[127]

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[126] Richard H. Pildes and Richard G. Niemi, "Expressive Harms, 'Bizarre Districts' and Voting Rights: Evaluating Election-District Appearances After *Shaw v. Reno*," *Michigan Law Review* 92 (1993): 500.

[127] Richard H. Pildes and Richard G. Niemi, "Expressive Harms," 500.

The arguments against bizarrely-drawn districts rely on a topos of order where there is a seemingly natural way to conduct redistricting and these districts violate that natural way. Pildes and Niemi state that the concern of the irregularly-shaped majority-minority districts focus on customs, practices and the social understanding, "including those concerning the legitimacy of political institutions."[128] If political bodies develop districts that violate traditional norms of the community, these districts raise awareness that politicians engage in the manipulation of public institutions for their own ends. When "race is added, the mix becomes more combustible and, in the Court's view, the Constitution enters the picture."[129] Yet the vagueness of "traditional norms," allows competing social factions to pursue the same goal for their own ends. As "traditional norms" could be understood in the history of racial-bloc voting, where there is a concern to prevent minorities from gaining political power, or it could be understood Constitutionally, preventing illegitimate action on the part of state governments to create segregated communities.

Finally, according to the Conservative Justices, the creation of districts with race as violates the most important norm in relationship between the citizen and the representative, as it constitutes the citizen as a member of the group rather than as an individual. In the vote dilution, racial gerrymandering, and partisan gerrymandering claims, the Conservative Justices constitute voting as a individual right, not group right, and value the independence of the voter in the electoral process. During the oral

[128] Richard H. Pildes and Richard G. Niemi, "Expressive Harms," 500.

[129] Richard H. Pildes and Richard G. Niemi, "Expressive Harms," 502.

arguments in *Vieth* v. *Jubelirer*, Justice Scalia argued against the Supreme Court's involvement with partisan gerrymandering claims on the basis that individual voting behavior is not predictable before elections occur. Noting that "race does not change," Justice Scalia suggested the opposite for voters according to partisan affiliation where it could change for any election based on numerous factors such as party registration, quality of candidate, presence of issues, or the quality of campaign run. Prejudging the partisan effect of a plan would be problematic since it could only be known with certainty how people would vote after they cast their ballot. Before the election, partisan voters are "very hard to identify… which is why the parties go about selecting their candidates very carefully."[130] Justice Scalia even discounted the evidence that Paul M. Smith, the lawyer arguing on behalf of the petitioners Richard Vieth, Norma Jean Vieth, and Susan Furey, suggested would provide the most accurate description of how a voter in a geographical area would vote, information from the previous elections, under the normative belief that voters decide for whom to cast their ballot in a rational manner and that behavior is not predictable in a district. The alternative, as John P. Krill Jr. suggested, is that experts determine the meaning of a map and not the people or their representatives, which disrupts the democratic process since, "if you allow the experts to control over the voters, then you'll never know the truth of what would really happen."[131] Pressing the point further, Krill argues, "Voters are not automatons in a matrix controlled by

[130] Transcript of Oral Argument at 12, *Vieth* v. *Jubelirer*, (2003) (No. 02-1580).

[131] Transcript of Oral Argument, *Vieth* v. *Jubelirer*,, (2003) (No. 02-1580).

supercomputers. Voters continue to matter, and they continue to prove it in election after election. In fact, they proved it in Pennsylvania in 2002 under this plan. The 17th congressional district, which the experts predicted would go Republican, did not."[132]

Krill's argument deflects away from the precision of redistricting exemplified in any modern districting plan. With the technology available, creating districts is best described through Kenneth Burke's "rotten with perfection," aspect of the "Definition of Man."[133] Burke writes that the, "principle of perfection is central to the nature of language as motive. There mere desire to name something but its 'proper' name, or to speak a language in its distinctive ways is intrinsically 'perfectionist.' What is more 'perfectionist' in essence than the impulse, when one is in dire need of something, to so state this need that one in effect 'defines' the situation."[134] In redistricting, the ability to "define the situation" or "define the district" heresthetically ensures the desired result reflects the desire for perfection as parties in control of the process seek perfection by capturing the most seats possible by ensuring that the terms of the debate will be the terms that the majority of the people accept.[135] Cartographers, under the supervision of legislatures and

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[132] Transcript of Oral Argument, *Vieth* v. *Jubelirer*, (2003) (No. 02-1580).

[133] Kenneth Burke, "Definition of Man," in *Language as Symbolic Action: Essays on Life, Literature, and Method,* (Berkeley, University of California Press, 1966), 16 – 20.

[134] Kenneth Burke, "Definition of Man," *Language as Symbolic Action,* 16.

[135] For a discussion of heresthetics, see William H. Riker, The Strategy of Rhetoric: Campaigning for the American Constitution, (New Haven: Yale University Press, 1996), 9. According to Riker, heresthetic concerns, "choosing and deciding… the art of setting up situations—composing the alternatives among which political actors must choose— in such a way that even those who do not wish to do so are compelled by the structure of the situation to supporter the heresthetician's purpose," (9).

not the legislatures themselves—a convenient fiction Krill deflects away from in his oral argument— possess the capacity to design districts with precision to exclude or include voters at will. Cartographers act as an intermediacy, the same role the experts would perform when discerning the results of the election. Further, as Justice Souter pointed out to Krill during the oral arguments, while the experts failed to predict one district correctly, they also predicted the other 18 correctly, "which does tell us something at least about their predictive criterion."[136]

While Justice Scalia and the Conservative Justices disdain treating voters in a predictable fashion and ignoring their independence and individuality, they find it is unconstitutional to stereotype voters in racial gerrymandering cases, preferring the view a person as an individual rather than a member of a political group. The ethical meaning of the "analytically distinct" cases, "acknowledge voters as more than mere racial statistics," who, "play an important role in defining the political identity of the American voter. Our Fourteenth Amendment jurisprudence evinces a commitment to eliminate unnecessary and excessive governmental use and reinforcement of racial stereotypes."[137] In partisan cases, the Conservative Justices argue that the predictive power of classification may not be powerful or effective before an election. However, as Justice Kennedy states in *Miller* v. *Johnson* with racial classifications:

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[136] Transcript of Oral Argument, *Vieth* v. *Jubelirer*, (2003) (No. 02-1580).

[137] *Bush* v. *Vera*, 517 U.S. 952, 985 (1996). The cases and precedents of which O'Connor speaks are *Shaw I, Miller, Hays, Shaw II,* and *Vera*.

> When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, think alike, share the same political interests, and will prefer the same candidates at the polls. Race-based assignments embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.... Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category. They also cause society serious harm."[138]

As much as Justice Kennedy's argument is prudential it is also ethical as it asks citizens and state legislatures to abandon the demoralizing stereotypes of the past when racial minorities were not treated as humans nor recognized as humans. By continuing to create unnatural geographic districts to combine voters in order for those voters to possess a voice means that the state legislature, and the Department of Justice that asks for those districts, concerns itself not with the community interests of voters but just on the superficial criteria of race, overlooking the notion that a citizen on the coastal plain of

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[138] *Miller* v. *Johnson*, 515 U.S. 900, 911 - 912 (1995). The full quote, with citations, states: When the State assigns voters on the basis of race, it engages in [*912] the offensive and demeaning assumption that voters of a particular race, because of their race, "think alike, share the same political interests, and will prefer the same candidates at the polls." Shaw, supra, at 647; see Metro Broadcasting, supra, at 636 (KENNEDY, J., dissenting). Race-based assignments "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts--their very worth as citizens--according to a criterion barred to the Government by history and the Constitution." Metro Broadcasting, supra, at 604 (O'CONNOR, J., dissenting).

Georgia may not have the same interests as the urban dweller of Atlanta.[139] In *Hunt* v. *Cromartie* and *L.U.L.A.C.* v. *Perry*, the Supreme Court struck down redistricting plans where the state attempted to eliminate a majority-minority district in one area and create a substitute majority-minority district for the same racial minority in another part of the state. Writing in *Cromartie I*, Chief Justice William Rehnquist argued that vote-dilution claims are not remedied by the drawing of another district somewhere else in the state as the voters who suffered the vote-dilution claim in the first place would not be remedied by the fact that other voters in the state possess the ability to elect a candidate of their choice. The only bridge between the two districts in question would be race and, "To accept that the district may be placed anywhere implies that the claim, and hence the coordinate right to an undiluted vote (to cast a ballot equal among voters), belongs to the minority as a group and not to its individual members. It does not.[140]" In *L.U.L.A.C*, a majority of Justice struck down a Latino majority-minority district, which was created to replace another Latino majority-minority district, because the decision rested on a belief that the new majority-minority district of Latinos thought alike, though they had not formed an "efficacious political identity" as the voters did in the old District 23.[141] Justice Clarence Thomas would take the stereotyping argument one step further than the rest. For Justice

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[139] According to Justice Kennedy's decision in *Miller v. Johnson*, under the redistricting plan in question, "the Eleventh District connected the black neighborhoods of metropolitan Atlanta, and other centers of population, with the poor black populace of coastal areas 260 miles away. The plan received Justice Department Clearance," (908).

[140] *Shaw* v. *Hunt*, 517 U.S. 899, 917 (1996).

[141] *L.U.L.A.C.* v. *Perry*, 548 U.S. 399, 435 (2006).

Thomas, "racial gerrymandering offends the Constitution," no matter if the use of race is malign or benign.[142] Further, relying on "the stereotype" that "blacks are reliable Democratic voters," would not be a defense for state legislatures, even though the empirical evidence suggested throughout the decision provides a strong correlation between race and party affiliation and interest.[143]

Throughout the analytically distinct cases, the Conservative Justices argue that unnecessary racial classifications that segregates voters on the basis of race and sends a racial message that excludes voters from the political process diminishes the prospect for political reconciliation between citizens and prevents a society in which race does not matter. However, because of the reliance on the communicative nature of injury and the reliance on the rational individual as the source of representation, the majority overstates its case. First, it fails to demonstrate the existence of a constitutional harm, especially in regards to its other categories of redistricting jurisprudence. Second, it fails to address why some majority-minority districts are constitutional but others are not since both would send a societal message about race in society. If the rational individualistic voter were the norm in society, which the occurrence of racial-bloc voting suggests otherwise, it would be beneficial to create districts where the aggregate of individuals could compete in society as Madison suggested in Federalist No. 10.[144] Yet, the ideological convictions of the

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[142] *Easley* v. *Cromartie*, 532 U.S. 234, 266 (2001).

[143] *Easley* v. *Cromartie*, 532 U.S. 234, 266 – 267 (2001).

[144] James Madison, "Federalist No. 10," in *The Federalist,* Ed. William R. Brock, (London: Phoenix Press, 1992), 45 – 47.

Conservative Justices prevent certain types of competition and certain factions to form in society, which contradicts their notion of judicial restraint in the political process. Consequently, the use of racial classifications become necessary to help individuals and groups achieve political equality in situations where there is a lack of political trust between groups.

Reconciliation through Self-Government

While the majority of the Supreme Court in the "Analytically Distinct" cases characterizes political equality in terms of citizens as being distinct individuals separate from any form of group identity, the dissenters in these cases characterize individuals as being a part of a political group. Political equality, according to this characterization, occurs through the development of self-government and representation for political groups. Reconciliation as a political act may occur only when the racial minorities receive political equality prior to the creation of districts, maximizing the group's political equality during and after. Because the record in each of the "analytically distinct" cases reveal a historical problem of racially-polarized voting, the dissenting justices adopt a realist style of argument to show that at this point in time the white majority will not speak for the racial minorities as the white majority has not done in the past. While the majority of the Supreme Court in these decisions attempt to remove the cases out of the immediate historical context and see the facts in terms of the idealistic, universal, and timeless provisions of the Constitution, the dissenters argue that the Justices must proceed from a standpoint of electoral realism, knowing that "voting rights law entertains the possibility

that geographical and political separation may remain facts of life," and the response must be the adoption of rules that reflect these possibilities.[145] Without the protection of their voice in the political process and without the ability to select a "candidate of choice," the votes, and hence interests, will not be effective, leaving the racial minorities with little chance of influence an election.

Political Equality: Equal Treatment for All Groups

Constitutionally, there are no explicit requirements that reject the use of race as a permissible classification. Legally, §2 of the Voting Rights Act allows for the protection of racial minorities when participating in the electoral process and the Supreme Court's rhetorical tradition concerning vote dilution claims under §2 from *Gingless* onward allows for the protection and creation of majority-minority districts to protect communities of interest even if these communities feature racial minorities as explicit political groups.[146] Since, as Justice Stevens notes in *Bush* v. *Vera*, it is highly unlikely that a State may "stumble across a district in which the minority population if both large enough and segregated enough to allow majority-minority districts to be created with at most a 'mere awareness,'"[147] racial and political minorities stand at an electoral disadvantage. Even districts in which a "natural" majority-minority district exists, such as in N.Y.-15 in Harlem, or N.Y.-16 in the Bronx, the majority of the Supreme Court supporting the

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[145] Pamela S. Karlan, "Our Separatism?" 84.

[146] This rhetorical tradition includes *Gingles*, *Growe* v. *Emison*, *Voinovich* v. *Quitler*, *Johnson* v. *DeGrandy*, *Abrams* v. *Johnson*, and *L.U.L.A.C.* v. *Perry*.

[147] *Bush* v. *Vera*, 517 U.S. 952, 1010 (1996).

"Analytically distinct" category, especially Justice Thomas, would desire to examine this district with the "same invidiousness" as the Supreme Court relied upon in *Gomillion*.[148]

Even before the Justices can concern themselves with political reconciliation, the dissenting Justices argue that the Supreme Court must concern itself with the ability of racial minorities to establish political equality. In *Bush* v. *Vera*, Justice Souter states that voting in not an "atomistic exercise" as the states gather and group individuals to allow them the ability to "choose a representative not only acceptable to individuals but ready to represent widely shared interests within a district."[149] Writing in terms of political realism, Justice Souter notes that:

> Racial groups, like all other groups, play a real and legitimate role in political decisionmaker. It involves nothing more than an acknowledgment of the reality that our concepts of common interest, geography, and personal allegiances are in many places simply too bound up with race to deny some room for a theory of representative democracy allowing for the consideration of racially conceived interests.[150]

Justice Souter's position argues that the law should follow the experiences in society rather then ideals in society. Districting should protect the communities and the development of politics in communities rather than ignore the communities and the possibility for

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[148] *Bush* v. *Vera*, 517 U.S. 952, 1020 (1996).

[149] *Bush* v. *Vera*, 517 U.S. 952, 1049 (1996).

[150] *Bush* v. *Vera*, 517 U.S. 952, 1049 (1996). See footnote 4.

politics. If "objective" and "traditional" districting are not neutral or objective standards, then state legislators should possess the discretion to create majority-minority districts, even if they are "bizarre" in shape. By adhering to the advancement of political equality for racial minorities, then the districting process will be guided based on reciprocity for ethnic, political, and racial groups. Once community of interests possess political equality, at least in proportionality to their population in society, then the groups can engage in dialogue over the resources of that state.

For dialogue to occur between competing political groups, the guiding principle must be reciprocity in relation to the proportionality of the population. In the vote dilution case of *Johnson* v. *DeGrandy*, the Supreme Court rules that proportionality is relevant evidence in determining whether or not a districting plan dilutes the voting strength of racial minorities.[151] Since proportionality is one aspect of a vote dilution claim, state legislators ought to consider ways in which to maximize proportionality for the political groups throughout the state. As Justice David Souter notes in *Shaw I*, because of the Voting Right Act and *Gingles*, as well as the historical and political contexts of racial polarized voting by citizens, state legislators will always need to consider race when creating districting plans to avoid minority vote dilution.[152] Since it is permissible,

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[151] *Johnson* v. *DeGrandy,* 521 U.S. 997, 1000 (1994). According to Justice O'Connor, proportional is an exact measurement between voting strength and population whereas proportionality is a rough standard. §2 of the VRA states that, "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." Since there is a rejection of proportional, the Supreme Court adopts proportionality. See *Johnson* v. *DeGrandy*, 521 U.S. 997, 1014 (1994), footnote 11.

[152] *Shaw* v. *Reno*, 509 U.S. 630, 680 - 681 (1993).

according to Justice Stevens in *Shaw I*, to consider other demographic material and for state legislators to "draw boundaries to provide adequate representation for rural voters, for union members, for Hasidic Jews, for Polish Americans, or for Republicans, it necessarily follows that it is permissible to do the same think for members of the very minority group whose history in the United States gave birth to the Equal Protection Clause."[153] Further, as he implies in *Miller* v. *Johnson*, because of the poor historical treatment, black citizens ought to receive the same benefits that other groups receive through the districting process.[154] However, since the Supreme Court states that "bizarre" shaped-majority minority districts are unconstitutional, there is a lack of reciprocity in the process. Since all acts of redistricting involve the use of group identity, state legislators will possess the authority to create majority-white districts, no matter if they follow or reject traditional districting principles.

The Contradiction of Representational Harm

In the "Analytically Distinct" cases, the majority of the Supreme Court relies upon two forms of communicative harms in relation to the political process, the "representational" harm (or "expressive" harm[155]) and the "stigmatic" harm. Yet, as the dissenters note, the reliance on the notion of "representation harm," does not correlate to

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[153] *Shaw* v. *Reno*, 509 U.S. 630, 679 (1993).

[154] *Miller* v. *Johnson,* 515 U.S. 900, 993 (1995).

[155] In *Bush* v. *Vera*, 517 U.S. 952, 1053 (1996) Justice Souter discusses draws from the work of Pildes and Niemi to discuss "expressive" harm as representational harm. According to Pildes and Niemi, an "expressive" harm "results from the idea or attitude expressed through a governmental action, rather than from the more tangible or material consequence the action brings about." See Richard H. Pildes and Richard G. Niemi, "Expressive Harms, 'Bizarre Districts,' and Voting Rights," 506 – 507.

the politics of apportionment. Relying upon a realist style, the dissenters note that "representational harm" is not similar to other forms of segregation, it is not indicative of the communication process, it relies on the same principle that the court abhors, it contradicts its position in other aspects of apportionment cases (majority-minority districts, partisan gerrymandering), and it overlooks the connection between politics and race.

First, Justice O'Connor's treatment of the ideal types of representation presents an inaccurate vision of representation and democracy, especially for racial minorities. By arguing that those who favor majority-minority districts because of the "descriptive representation" deflects away from the type of representation racial minorities desire, especially in the context of racial-bloc voting. While "descriptive representation" plays a role in the creation of majority-minority districts, as the fear is without a close connection between a representative and his/her constituents would means that the representative would not speak for and act on behalf of the constituents, a representative in a majority-minority district does not possess the luxury of acting on behalf of just the minority constituents. David T. Canon notes that white representatives from districts that are 30% - 40% black can ignore the black constituents if the representative believes they are unnecessary to victory; however, a black representative from a district that is 30% - 40% white cannot ignore the white constituents since, "they are operating in an institution that

is about 86% white and a nation that is 82.5% white."[156] In *Johnson* v. *DeGrandy*, Justice Kennedy states that the reality of representation is not as black and white as, "the assumption that majority-minority districts elect only minority representatives, or that majority-white districts elect only white representatives, is false as an empirical matter,"[157] and, further, assumption reflects "the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens."[158]

Consider the facts of *L.U.L.A.C.* v. *Perry*, where two of the districts in the Texas case did not follow the ideal type of "descriptive representation" that Justice O'Connor argues against. In *L.U.L.A.C.*,, African-American voters in District 24 claimed that the state legislators diluted their right to vote because they supported Democratic Representative Martin Frost and the redistricting plan prevented them from electing him. In South Texas, the Texas Republicans diminished the voice of a Latino voting community by eliminating 100,000 Latino voices from District 23 and placing them in District 25 in an effort to protect Republican Representative Henry Bonilla, whom the Latino voting community in District 23 did not want as a Representative. Both examples

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[156] David T. Canon, *Race, Redistricting, and Representation: The Unintended Consequences of Black Majority Districts*, (Chicago: The University of Chicago Press, 1999), 13. In this quote, Cannon paraphrases Lani Guinier, "The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success," *Michigan Law Review* 89 (1991).

[157] *Johnson* v. *DeGrandy*, 512 U.S. 997, 1027 (1994), quoting from the Supreme Court decision *Voinovich* v. *Quilter,* 507 U.S. 146, 151-152, 158 (1993).

[158] *Johnson* v. *DeGrandy*, 512 U.S. 997, 1027 (1994), quoting *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 636, 111 L. Ed. 2d 445, 110 S. Ct. 2997 (1990) (Kennedy, J., dissenting).

show that the ability of a community to elect a candidate of choice does not refer to "descriptive representation" but a concept of representation that focuses on the idea that the representative shares the same interests and will work to advance the interests of his or her constituents.

Second, according to the majority's discussion of "representational harm," when the state legislators rely on race as the predominant motive to create electoral districts and neglects other traditional districting principles, the state legislators send a message to the citizens of the state. Yet, as Justice Stevens notes in *Miller* v. *Johnson*, regardless of the intent of the state legislators, the harm occurs when the citizens of the state receives a message that "all or most of the black voters support the same candidate, and, second, if the successful candidate ignores the interests of her white constituents."[159] The harm in these cases is psychological and, instead of harming only the "outsiders" in the district, Justice Stevens notes in *Shaw II* that the "the supposedly insidious messages that *Shaw I* contends will follow from extremely irregular race-based districting will presumably be received in equal measure by all state residents."[160] If there were a problem, it would exists throughout the state though the Court's decision in *Hays* prevents citizens form outside the district to bring forth claims.

Yet, for Justice Stevens, there is no constitutional principle that, "can discern whether a message conveyed is a distressing endorsement of racial separatism, or an

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[159] *Miller* v. *Johnson*, 515 U.S. 900, 930 (915).

[160] *Shaw* v. *Hunt*, 517 U.S. 899, 923 – 924 (1996).

inspiring call to integrate the political process."[161] Further, if the majority were correct in stating that districting decisions on the basis of race would create an outsider status, then the opposite would be true for the racial minorities as racial minorities in majority-white districts will be ignored and, if there is harm, the harm does not matter. Yet, the majority declines this interpretation, as that is the "natural order" even trough districting. Evidently, when the majority establishes a claim against racial classification because it treats the individual as a group, then the Conservative majority relies on the same principle it abhors to establish that everyone in society, even if they may share the same interests of those in the district though they may be of a different race, would be offended by the use of race. Further, the conservative majority fails to consider this communicative harm in partisan reapportionment where the effects of partisanship where a political divide can separate in the same way as a racial divide can. A political minority in a partisan district receives the same virtual representation that the white minority receives in a majority-minority district. Yet, for the Conservative Justices, that is part of the political process.

The Language of Segregation

While the majority of the Court relies on the language of segregation to describe the irregularly-shaped majority-minority districts, the dissenters reject the analogy. In *Shaw I*, Justice O'Connor referred to voters of District 1 as being segregated into the district based on their race, which implies they received unequal treatment, just as voters were in

[161] *Shaw* v. *Hunt*, 517 U.S. 899, 925 (1996). Justice Stevens notes that the difference between some residents receiving color-blind district making and other citizens that received color-blind districts concerns geography.

the case of *Gomillion* v. *Lightfoot*. Further, the district amounts to "balkanization," or a "political apartheid" that "reinforces the perception that members of the same racial group -- regardless of their age, education, economic status, or the community in which they live -- think alike, share the same political interests, and will prefer the same candidates at the poll."[162] By perpetuating stereotypes, the state legislators limit the "multicultural democracy" with the "the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury."[163]

The implication with these comments is that District 12 compares to the segregation at the center of *Brown* v. *Board of Education*[164] and that the state creates "Black" and "White" water fountains because of the public reference of race in the districting process.[165] Yet, as Justice Souter argues in *Bush* v. *Vera*, the complaint is that voters have been placed in a district where their vote does not matter as much as it would in another district. The complaint is not one of racial "apartheid" but racial integration. Pamela Karlan notes that the contested districts in *Shaw I* were some of the most integrative districts in the country.[166] Writing about the purpose of bizarrely drawn majority-minority districts in *Bush* v. *Vera*, Justice Souter states that the districts were dawn not to subjugate

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[162] *Shaw* v. *Reno*, 509 U.S. 630, 647 (1993).

[163] *Shaw* v. *Reno*, 509 U.S. 630, 648 (1993).

[164] *Shaw* v. *Reno*, 509 U.S. 630, 683 (1993). See Footnote 4.

[165] *Shaw* v. *Hunt*, 517 U.S. 899, 923 – 924 (1996).

[166] Pamela S. Karlan, "Our Separatism?" 94. The District in questioned possessed an American-American population of 53.5 percent.

on the basis of race but to "give a racial minority the same opportunity to achieve a measure of political power that voters in general, and white voters and members of ethnic minorities in particular, have enjoyed as a matter of course."[167] Since race was used to enhance the prospect of a racial minority in participating in the political process, Justice Souter notes that it cannot affect an individual or group in the way that de jure segregation and does not convey a message about the racial inferiority or outsider status or members of the white community.[168]

Since the dissenters reject the language of segregation, they also reject the analogies that the majority relies upon to strike down segregation. In *Miller* v. *Johnson*, Justice Stevens writes that the meaning of the segregation cases concern the "exclusion of black citizens from public facilities reserved for whites. In this case, in contrast, any voter, black or white, may live in the Eleventh District [of Georgia]."[169] He added that in the desegregation claims, "legal segregation frustrated the public interest in diversity and tolerance by barring African Americans from joining whites in the activities at issue. The districting plan here, in contrast, serves the interest in diversity and tolerance by increasing the likelihood that a meaningful number of black representatives will add their voices to legislative debates."[170]

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[167] *Bush* v. *Vera*, 517 U.S. 952, 1055 (1996).

[168] *Bush* v. *Vera*, 517 U.S. 952, 1055 (1996).

[169] *Miller v. Johnson*, 515 U.S. 900, 931 (1995).

[170] *Miller v. Johnson*, 515 U.S. 900, 931 - 932 (1995).

The complaint by the voters raises the awareness that racial divisions exist in the first place. In objecting to the plan, the plaintiffs preferred a color-blind approach to the districting effort though it is unclear if the plaintiffs would be satisfied if this were to occur. Justice Stevens write that the creation of a majority-minority district outside of the area that contains racially-polarized voting may help reduce the representational harm even if race was the predominant factor in creating a bizarrely drawn district since the representative will need electoral support from black and white constituencies.[171] Karlan notes that the complaint that District 12 constitutes "political apartheid" reveals that voting is an individualistic and atomistic enterprise as Justice Clarence Thomas describes in *Holden* v. *Hall* or, even worse, that the subtext to the South African reference concerns the idea that what is troubling is the prospect of "African-Americans" possessing power as the "segregated district suggests that "only majority-white, and therefore white-controlled, jurisdictions can be integrated."[172] While Karlan over-generalizes in her statement, as both liberal and conservative groups protested the nature of the majority-minority districts,[173] even Justice Stevens states that the record in *Miller* v. *Johnson* reveals what the respondents

[171] *Shaw* v. *Hunt*, 517 U.S. 899, 948 (1996).

[172]Karlan, "Our Separatism?" 95.

[173] Tinsley E. Yarbrough, *Race and Redistricting*, 83 – 91. While Liberal Democrats Ruth Shaw and Robinson Everett believed that the creation of the majority-minority districts were a reminder of what the Supreme Court struck down in *Brown v. Board of Education*, some Conservatives, who opposed or reluctantly accepted the right to vote for racial minorities in the South, attacked the district to petition the Supreme Court to adopt a color-blind view of the Constitution, which could limit the political equality and benefits racial minorities would receive, especially if they did not possess majority-minority districts.

contest is the inclusion of too many lack voters in the District as drawn."[174] In *Shaw II*, Justice Stevens expresses the same concern, stating that "North Carolina's districting plan served to require these plaintiffs to share a district with voters of a different race. Thus, the injury that these plaintiffs have suffered, to the extent that there has been injury at all, stems from the integrative rather than the segregate effects of the State's redistricting plan."[175]

Reconciliation through the Development of Community Interests and Self-Government

Adopting a realist style on their decisions, the dissenters in the Analytically Distinct cases argue that since racial-bloc voting exists, regardless of whether or not the majority of the Justices on the Supreme Court acknowledge it, what is necessary is the protection of communities of interests and the ability of state legislators to develop redistricting plans to meet the needs of the citizens within the state. By accomplishing this task, reconciliation may occur through representation, however, because of the history of racial-bloc voting and the failure of the majority to provide a voice for the minority, reconciliation will not occur without the establishment of political equality for racial minorities.

Since all redistricting acts requires classification and division, the concern of the Supreme Court ought to be in the way in which state legislators consider race rather than that the state legislators considered race. According to this view, since voting occurs as a

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[174] *Miller v. Johnson*, 515 U.S. 900, 931 (1995).

[175] *Shaw* v. *Hunt*, 517 U.S. 899, 922 (1996).

group right, the rule of justice would require equal treatment for groups, especially until there can be some form of normalization in economic and social conditions. If the state can divide groups based on the paternalistic notion of what is best for the individual, communities of interest will continue to suffer.

One of the recurring themes in the racial gerrymandering cases is that state legislators rely on bizarrely drawn districts to unite communities of interest even if these communities of interest are not within a close proximity to one another. While the majority of the justices claim that, by linking voters that do not live in close proximity to one another, stereotypes voters and sends a stereotypical message that of a certain races and ethnicities will "think alike" regardless of immediate geographic interests, the dissenters note that the creation of districts by race or ethnicity does not necessarily send a negative message but creates and reinforces a felt identity. In *Miller* v. *Johnson*, Justice Ginsburg states that ethnicity itself binds communities, even people with divergent social or economic interests, and there are times when legislators desire to represent districts based on shared traditions from ethnic, racial, or social practices.[176] In *Shaw II*, Justice Stevens notes that though it was aesthetically "bizarre" in shape, "members of the public as well as legislators" urged the separation of urban and rural communities; consequently the majority-minority District 12 united voters in urban areas while the majority-minority District 1 united voters in cities that contained less than 20,000 people.[177] Since the urban

[176] *Miller* v. *Johnson*, 515 U.S. 900, 944 - 945 (1995).

[177] *Shaw* v. *Hunt*, 517 U.S. 899, 939 (1996).

black and rural black of North Carolina possess different and competing political traditions, Justice Stevens though it best to allow the state legislature to protect those interests separately as they rejected plans that created majority-minority districts but did not protect communities of interests.[178]

In deferring to legislators about developing districts that protect communities of interest, the dissenters follow the judicial topos that legislatures possess the primary authority to determine redistricting. The primacy argument allows the Supreme Court to defer to the discretionary power of the state legislators when dealing with a delicate matter, so long as the state legislators follow the necessary constitutional provisions and precedents, but it allows the people to facilitate reconciliation through electoral reform. In *Miller* v. *Johnson*, Justice Ginsburg follows the civic-republican rhetorical tradition in redistricting cases, noting that the process contains political considerations that state legislators must consider geographic, economic, historical and political consideration when drawing lines and the court's are ill-equipped to handle these concerns of legislative compromise and accountability.[179] By striking down these majority-minority districts as being unconstitutional, the dissenters argue that the majority of the Supreme Court hinders the ability of racial minorities to participate more effectively in the democratic process.[180]

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[178] *Shaw* v. *Hunt*, 517 U.S. 899, 939 (1996).

[179] *Miller* v. *Johnson*, 515 U.S. 900, 936 (1995).

[180] *Shaw* v. *Hunt*, 517 U.S. 899, 918 (1996).

By providing access to the political process through majority-minority districts, the Justice Souter argues that racial minorities will possess the political equality necessary to allow for assimilation and reconciliation. Justice Souter notes that the lesson the Supreme Court ought to follow is the integration of ethnicities occurring during the nineteenth and twentieth centuries. Justice Souter notes that by protecting constituencies on the basis of ethnicities, those constituencies allowed their candidates to enter mainstream politics and obtain political power for the group.[181] By fostering a democratic pluralism, states avoided "ethnic apartheid," leading to the development of, "ethnic participation and even a moderation of ethnicity's divisive effect in political practice. For although consideration of ethnicity has not disappeared from the American electorate, its talismanic force does appear to have been cooled over time.[182] In addition to increasing access to social benefits such as education through the political process, the access to political power develops political equality and fosters political participation.

The language of the Supreme Court must focus on developing themes of representation that seek to be inclusive for diverse groups since, over time, the integration of diverse groups would diminish the ill will between them. Assimilation and reconciliation may occur through greater participation in the activities and institutions within society: "Voting is not just an expression of political preference; it is an assertion of

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[181] *Bush* v. *Vera*, 517 U.S. 952, 1074 (1996). Justice Souter cites Dennis R. Judd, *The Politics of American Cities: Private Power and Public Policy*, (New York: Little Brown & Company, 1979).

[182] *Bush* v. *Vera*, 517 U.S. 952, 1074 (1996). Justice Souter cites Dennis R. Judd, *The Politics of American Cities: Private Power and Public Policy.*

belonging to a political community."[183] Through the continued developments of democracy within political communities, especially in reference to increase voter registration and ensuring that votes count and elections matter, the hope is that the use of race will follow the path of the use of ethnicity: By protecting race as the political process protect ethnicity, communities will use the democratic process to see beyond race.[184]

If there are citizens that reject the concept of racial districting, the proper procedure for citizens is to convince other citizens that the use of racial is wrong, morally or politically, and to vote those state legislators out of office. In *Bush* v. *Vera*, Justice Stevens notes that the proper remedy for those who commits this "representational harm" is for citizens to elect a representative that is not from his/her ethnic or racial or for the citizens to refuse to elect representatives that would refuse to rely on racial classifications.[185] Stevens adds that even if a "political prediction based on race is incorrect, the voters have an entirely obvious way to ensure such irrationality if not relied upon in the future: vote for a different party. A legislator relying on racial demographics to ensure his or her election will learn a swift lesson if the presumptions upon which that reliance was based are incorrect."[186] While these arguments follow the idea expressed in *Colegrove*, there are not the structural constraints to prevent citizens from enacting change.

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[183] Kenneth L. Karst, "Paths to Belonging: The Constitution and Cultural Identity," *North Carolina Law Review* 64 (1986): 347 – 350.

[184] *Bush* v. *Vera*, 517 U.S. 952, 1077 (1996).

[185] *Bush* v. *Vera*, 517 U.S. 952, 1013 (1996). See footnote 9.

[186] *Bush* v. *Vera*, 517 U.S. 952, 1032 (1996). See footnote 29.

Though citizens who reject the use of race for districting may face constraints because of attitudes, the general low number of minorities passed the majority mark that create a majority-minority district allows for those opposed to mount a campaign against them. If nothing else, a person representing a majority-minority district may not possess the ability to "represent" only the racial minority in the district and while need to seek out the greatest coalition possible.[187]

The language rejecting the notion of representational harm and accepting group representation provides a better vision of the actual electoral process. Instead of cleansing the language of representation and hoping that divisions will disappear, regardless of the historical disadvantages in society, the dissenters in the analytically case argue that integration in the political process will develop through the advancement of political equality. Voting law and voting rights are not similar to other forms of law as they concern the foundations of our political society. Consequently, because reapportionment and redistricting concerns the development of shared power, groups must possess access to that power.

The Color-Blind Constitution & Judicial Ethos: Same As It Ever Was

Discussion of the color-blind Constitution focuses on an ethical debate of constitutional interpretation. Specifically, it asks whether or not the government ought to create and employ racial classifications and, hence, treat citizens different on the account of immutable characteristics. In *The Color-Blind Constitution*, Andrew Kull argues that

[187] See David T. Cannon, *Race Redistricting and Representation*, for a discussion on how focusing on the "supply-side" of majority-minority districts allows the reader to see how candidates respond to changes in the electorate.

Congressional standard of "reasonable" for racial classifications, even if subject to judicial veto, is the ghost of racial animosity haunting constitutional interpretation. A "reasonable" standard allows for democratic majorities to create "separate but equal" laws and provides judges the power of discretion to uphold those programs regardless of whether or not these laws discriminate against citizens. Kull writes that "racial classifications are so dangerous that they cannot safely be left to legislative discretion not, by extension, to a standard of 'reasonableness' enforced after the fact by judges."[188]

The implied solution for Kull is to follow the prophetic vision of the early advocates for abolition and civil rights, such as Charles Sumner, Wendell Phillips, and Supreme Court Justice John Marshall Harlan. In *Plessy* v. *Ferguson*, 163 U.S. 537, (1896), Harlan states: "But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."[189] By relying on the arguments of Justice Harlan, Kull, and other advocates of the color-blind Constitution argue that any classification, regardless of context, leads to agitation and distrust between the races. If the government does not need to uphold the law, then Justice Harlan fears there is no

[188] Andrew Kull, *The Color-Blind Constitution*, (Cambridge: Harvard University Press, 1992) 46. Kull's implied argument is that the 39th Congress made a terrible mistake in adopting an equal protection clause instead of a non-discrimination clause, i.e. the Color-Blind Clause. The 39th Congress, according to Kull, adopted "equal protection" instead of a non-discrimination clause because "equal protection" means less and not more. In comparison, the non-discrimination clause seemed more radical than equal protection (68 – 69). Kull writes, "the fact that they [black Americans] still suffered from discrimination made it clear that neither a probation of slavery nor a guarantee of equality was adequate constitutional prohibition" (66).

[189] *Plessy* v. *Ferguson*, 139 U.S. 537, 559 (1896).

need for the people to uphold the law, making it permissible for white citizens to brand racial minorities with a "bade of servitude." While formal slavery would have been expelled from American society, the "Separate but Equal" law would, "there would remain a power in the States, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom to regulate civil rights, common to all citizens."[190]

Yet, behind Justice Harlan's idealism, there is a skeptical view if race relations in society. Andrew Kull writes that Harlan's view is a pessimistic view of human nature and the institution of government: "the tools of government we know to be capable of much harm, and that we cannot confidently use them for good, should be abjured altogether. The experience of the intervening century has not yet proved Harlan wrong."[191] Of course, as Tinsley E. Yarbrough writes, Justice Harlan did not write against all race-conscious legislation just the race-conscious legislation like segregation that "degraded" race and opposed policies "based on the presumption of racial authority."[192] Further, in *Plessy*, state officials ignored the law and perpetuated discrimination and segregation between the races. According to Kurt H. Wilson, the meaning of segregation did not concern separation but supremacy as, "segregation was… an expression of prejudice, a symbolic affirmation of white supremacy."[193] If the original understanding of equal protection failed

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[190] *Plessy* v. *Ferguson*, 139 U.S. 537, 563 (1896).

[191] Andrew Kull, *The Color-Blind Constitution*, 224.

[192] Tinsley E. Yarbrough, *Race and Redistricting,* 197,

[193] Kirt H. Wilson, *The Reconstruction Desegregation Debates: The Politics of Equality and the Rhetoric of Place, 1870 – 1875*, (East Lansing: Michigan State University Press, 2002), 4.

to persuade some Southerners to alter their attitudes to tolerate and not even accept racial minorities, let alone allow racial minorities the political ground to develop equality, there may be doubt as to whether a color-blind interpretation, which may diminish the ability of a racial group to establish political equality, would allow individuals to "see-past" race.

Judicial Recognition and Enactment of the Color-Blind Constitution

In *Shaw* v. *Reno*, *United States* v. *Hays*, and *Shaw* v. *Hunt,* those challenging the districts raised the complaint that the use of race in districting violates the color-blind Constitution. While there is no conception of a color-blind Constitution in the explicit text, the existence of it can be found as an ethical argument about the Constitution itself. In *Shaw I*, the complaint by Robinson Everett claims that the use of color in districting denied citizens, whether black or white, diminishes the ability for citizens to "participate in a process for electing members of the House of Representatives which is color-blind and wherein the right to vote is not abridged on account of race."[194] In *United States* v. *Hays*, the appellees raised a similar complaint, alleging that voters in Louisiana suffered injuries, "to participate in a process for electing members of the House of Representatives which is color-blind and wherein the right to vote is not limited or abridged on account of the designated race or color of the majority of the voters placed in the designated districts."[195] During the oral arguments for Shaw II, the counsel for the plaintiffs argued that the General Assembly's use of race constituted a, "failure to obey a constitutional command to

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[194] Tinsley E. Yarbrough, *Race and Redistricting,* 35.

[195] *United States* v. *Hays*, 515 U.S. 737, 750 – 751 (1995).

legislate in a color-blind manner conveyed a message to voters across the State that 'there are two black districts and ten white districts.'"[196] In raising these claims, the strategy was to present the Supreme Court with an opportunity to recognize the substantive right of a color-blind Constitution as a few of the Justices believed in the idea of a color-blind Constitution.

By redefining representation to constitute a relationship between the individual and the representative, rather than an ethnic, political or racial group and the representative, the Conservative Justices desire to incorporate the ideology of the color-blind constitution into the founding text, the fundamental values, and apportionment and districting jurisprudence. Acting as the main proponent for the ideology, Clarence Thomas's dissenting opinion in *Holden* v. *Hall*, 512 U.S. 874 (1994)[197] provides the judiciary with an argumentative foundation to end the Reapportionment Revolution. Further, Justice Thomas' opinion in *Holden* provides an argumentation foundation to strike down the Voting Rights Act and institute a color-blind Constitution.[198]

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[196] *Shaw* v. *Hunt*, 517 U.S. 899, 921 – 922 (1996)

[197] In *Holden* v. *Hall*, 512 U.S. 874 (1994) the Supreme Court rules that the size of a governing body is not subject to challenge under §2 of the VRA. While joining the holding but rejecting the reasoning of the majority that argues there is no benchmark "against which the size of a governing body may be compared to,", Justice Thomas states that since size of the governing body does not constitute a voting "standard, practice, or procedure," there is no violation of §2 (892 – 893). The dissenting opinion in *Holder* v. *Hall* serves as the standard defense for Justice Thomas, as well as the dissenting Justices in the Vote Dilution cases, as to why the judiciary ought to leave the political thicket and develop a color-blind reading of the constitution, though he is not clear as to the state of the voting rights precedent. Note: the Supreme Court handed down its decision in *Holder* v. *Hall* on the same day as *Miller* v. *Johnson*.

[198] In *Parents Involved* v. *Seattle School District*, 551 U.S. ___, (2007) the Supreme Court struck down school integration in Washington and Kentucky. Speaking for a plurality with Justices Scalia, Thomas, and Alito, Chief Justice Robert's wrote that the Court struck down the plan because it relied on race as the predominant factor in how the plan characterizes students and failed a narrow reading of strict scrutiny. For

For Justice Thomas, what matters most is the "correct" principle behind the constitution and not the reliance on the discretion of the legislators, whether the public accepts the decision, whether the law matches the "reality" of society, or the materialization of the consequences form a decision. In order for the Supreme Court to return to the necessary first principles of the Constitution, the Supreme Court must return to the judicial philosophy of legal formalism, at least for its apportionment cases. However, before the Supreme Court can return to legal formalism, the Justices must first invent the substantive right of color-blindness as the interpretive key to the fourteenth amendment.

Like Justice Felix Frankfurter and Justice Harlan, Justice Thomas reestablished the dissenting rhetorical tradition that focuses on the judiciary's involvement into reapportionment and redistricting politics. In short, Justice Thomas argues that there are numerous theories that discuss effective suffrage and representation as well as the proper apportionment of political power in a representative democracy, including his own. If the judiciary were to decide the meaning of effective representation, as it did in *Baker*, *Wesberry*, and *Reynolds*, then that constitutes a political question as it must determine the meaning and dilution of a vote. In *Allen* v. *Board of Education*, the Supreme Court made a second political decision as it would need to determine the essence of racial vote dilution and what would be the best type of electoral district e.g. single-member district multi-

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C.J. Roberts, the constitution is color-blind and, "The way to stop discriminating on the basis of race is to stop discriminating on the basis race." In a concurring opinion, Justice Thomas also relied on the substantive right of a color-blind constitution, invoking the words of Justice Harlan from *Plessy*. While a plurality relied upon the color-blind Constitution, Justice Kennedy, who cast the deciding vote, argued that the school plans were not narrowly tailored enough and, consequently, did not pass strict scrutiny.

member districts that states and the judiciary should employ.[199] Yet, as Justice Thomas states, there is no principle that declares single-member districts to be preferred, proper, or historically correct method for elections, just a judicial invention to enhance the ability of any "numerical minority" to gain political power, to have their representatives mirror the thoughts and interests of the constituents, and to allow voters the ability to cast a controlling and not influencing vote.[200] Once the Supreme Court constitutes equality as the primary goal, then it must reconsider its position to ensure political fairness for political minorities is on top of the hierarchy, ensuring that state legislators do not dilute the votes of racial minorities. Consequence, by entering in the political thicket, the Supreme Court handed the federal judiciary the unwarranted authority to "develop principles of representative government, for it is only a resort to political theory than can enable a court to determine which electoral systems provide the 'fairest' levels of representation or the most 'effective' or 'undiluted' votes to minorities."[201]

If the Supreme Court's power to invent the standards of representative government weren't enough, the Supreme Court's entrance in *Baker* created an unintended telos of perpetuating racial discrimination. According to Justice Thomas, the Supreme Court's decision in *Gingless* allowed state legislators and the judiciary to think

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[199] *Holden* v. *Hall*, 512 U.S. 874, 896 – 897 (1994). In its redistricting decisions, the Supreme Court's precedent requires single-member districts if court drawn and is very skeptical of multi-member districts since they can dilute he votes of racial minorities.

[200] *Holder* v. *Hall,* 512 U.S. 874, 897 – 900 (1994).

[201] *Holder* v. *Hall,* 512 U.S. 874, 893 (1994).

about race when redistricting, leading to the tragic assumption that state legislators and the judiciary can reinforce the idea that racial and ethnic groups possess distinct political interests and provide credence to the view that "race defines political interest," meaning that "members of racial and ethnic groups must all think alike on important matters of public policy and must have their own 'minority preferred' representatives holding seats in elected bodies if they are to be considered represented at all."[202] Because of *Gingles*, the courts and state legislatures can create "racially 'safe boroughs'... systematically dividing the country into electoral districts along racial lines—an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of 'political apartheid.'"[203] To avoid reprimand form the DOJ, states discriminate against its citizens by districting on the basis of race, reinforcing the view that those members of the district think alike and "that their interests are so distinct that the group must be provided a separate body of representation in the legislature to voice its unique point of view."[204] Morally scolding in tone, Justice Thomas writes that this discrimination under the "assumptions upon which our vote dilution decisions have been based upon should be repugnant to any nation that strives for the ideal of color-blind Constitution."[205]

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[202] *Holder* v. *Hall,* 512 U.S. 874, 903 (1994).

[203] *Holder* v. *Hall,* 512 U.S. 874, 905 (1994).

[204] *Holder* v. *Hall,* 512 U.S. 874, 906 (1994).

[205] *Holder* v. *Hall,* 512 U.S. 874, 905 - 906 (1994).

Under the idea of the color-blind Constitution, legislation must possess a telos of color-blindness. Even the VRA, which explicitly provides for the protection of racial minorities while it prohibits vote dilution and retrogression must advance the telos of the color-bind Constitution. Even Justice Kennedy, who believes that some racial classifications are constitutionally permissible, argues that the telos of society is the development of a color-blind Constitution and those legislative acts under the guide of the VRA threatens that ideal. In *Miller* v. *Johnson*, Justice Kennedy writes that is the goal of society is reconciliation and, "If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury."[206] If legislation such as the VRA allows state legislators to treat individuals as stereotypes rather then as individuals, Kennedy states, "It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids."[207]In *Georgia* v. *Ashcroft*, Justice O'Connor writes that though the judiciary and the DOJ, "should be vigilant in ensuring that States neither reduce the effective exercise of the electoral franchise nor discriminate against minority voters, the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer

[206] *Miller* v. *Johnson*, 515 U.S. 900, 927 – 928 (1995)

[207] *Miller* v. *Johnson*, 515 U.S. 900, 928 (1995).

matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life."[208]

By invoking the notion of the color-blind Constitution, the Conservative Justices attempt to define voting rights and constitutional interpretation to concern the individual rather than a group. Relying on the assumed characteristic of the group, when state legislators district based on race the state government will send a societal message reinforcing the "essential" characteristics and the stereotypes of the group. Yet, in shifting the focus from the group to the individual, the logic of the argument states that if race is the problem, and the issue of one race embedding supremacy into the law and political structures of society is not the problem, then the answer to the problem is to prevent the consideration of race, leaving the state legislators and the federal judiciary with the simplistic tautology of Chief Justice Roberts, "The way to stop discriminating on the basis of race is to stop discriminating on the basis of race."[209] By neglecting race or preventing it as a viable classification for state legislators and the federal judiciary, the telos is to look beyond that which divides and to move beyond the past rather than to relive the resentment through each classification. As a strategy, reconciliation is possible if those in power avoid developing structures that foster division: "As a practical political matter, our drive to segregate political districts by race can only serve to deepen racial divisions by

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[208] *Georgia* v. *Ashcroft*, 539 U.S. 461, 491 (2003).

[209] *Parents Involved* v. *Seattle School District,* 551 U.S. ___, 41 (2007) (C.J. Roberts, concurring).

destroying any need for voters or candidates to build bridges between racial groups or to form voting coalitions."[210]

Additionally, underlying the switch from a group right to an individual right and from the use of racial classifications to the color-blind Constitution is a reclassification of the authority of the judiciary and its role within in a democratic society. In *Holder* v. *Hall*, Justice Thomas creates a proposition that synthesizes concerns of both Justice Frankfurter and the proposition of Justice William Brennan in *Baker* v. *Carr*. While Justice Frankfurter argued that the judiciary possessed no authority to determine apportionment decisions and Justice Brennan offered a people a new method of interpretation and a new conception of law, Justice Thomas offers future Supreme Court Justices with a judicial map to leave the political thicket. By implying that the Court's decision in *Baker* results, eventually, in the use of racial classifications by state legislatures, Justice Thomas presents to those who support the notion of a color-blind Constitution a means to achieve its Constitutional recognition. By arguing that the use of racial characteristics to create electoral districts divides the public is an act that is "so repugnant to the Constitution and to a free people," Justice Thomas concludes that the only alternative is the one that sees beyond race. To sustain this view, though, the Supreme Court must return to the decision in which the Supreme Court erred in principle, *Baker* v. *Carr*.

According to Justice Thomas, since *Baker,* the Supreme Court increased its unwarranted authority to decide redistricting cases and invented political solution after

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[210] *Holder* v. *Hall,* 512 U.S. 874, 907 (1994).

political solution in order to determine the correct form of effective representation. The solution then is to retrace the Court's path, step-by-step, until it over-turns *Baker*. Since Thomas' position himself as a formalist and not a realist, the consequences of the law matters little, only the principle does. In *Holder*, he writes:

> We would be mighty Platonic guardians indeed if Congress had granted us the authority to determine the best form of local government for every county, city, village, and town in America. But under our constitutional system, this Court is not a centralized politburo appointed for life to dictate to the provinces the "correct" theories of democratic representation, the "best" electoral systems for securing truly "representative" government, the "fairest" proportions of minority political influence, or, as respondents would have us hold today, the "proper" sizes for local governing bodies. We should be cautious in interpreting any Act of Congress to grant us power to make such determinations.[211]

By relying on the Platonic Guardian topos, Justice Thomas argues that the Supreme Court violates principles of representative government by determining the form of government and the meaning of effective representation. To clarify the problems with the Supreme Court's jurisprudence, Justice Thomas argues that the Supreme Court initiate an act of interpretation that will provide an exit strategy, resulting in the eventually discarding of Baker v. Carr. By doing so, the Supreme Court will constitute representation as an individual right to vote and place the authority of representation back to into the hands of

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[211] *Holder* v. *Hall,* 512 U.S. 874, 913 (1994).

the state legislators, who will possess the discretion to enact representation but will not be able to do so on the basis of race or ethnicity.

While the Supreme Court has yet to adopt a color-blind reading of the Constitution, the Conservative Justices invented other means to reduce the efficacy of the Voting Rights Act by redefining and diminishing the scope of §5. When deciding cases that concern §5's retrogression purpose and effect clause, the Supreme Court determines that §5 concerns participating in the political process and not winning seats. In *Reno* v. *Bossier*, 520 U.S. 471 (1997), the Supreme Court rules, in a 5 – 4 opinion by Justice O'Connor, that when the Attorney General or the DOJ reviews a plan under §5, it does not need to consider whether or not the plan dilutes the vote of racial minorities as the only concern is retrogression.[212] In *Reno* v. *Bossier*, 528 U.S. 320 (2000), The Court's 5 –4 decision by Justice Scalia argues that that §5 of the VRA does not prohibit preclearance of a plan that possesses a discriminatory but not retrogressive purpose as the purpose prong of §5 only covers retrogressive dilution.[213] Finally, in *Georgia* v. *Ashcroft*, 539 U.S. 461 (2004), Justice O'Connor's 5 – 4 decision weakens further the meaning of retrogression

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[212] *Reno* v. *Bossier*, 520 U.S. 471, 480 (1997). For retrogression, the judiciary must consider the existing plan with the previously accepted plan (478). As Justice Steven points out, this means that the AG or the DOJ may approve a plan the violates the VRA under §2, making the plan unconstitutional (497).

[213] *Reno* v. *Bossier*, 528 U.S. 320, 328 - 329 (2000), Justice Thomas noted this case was unnecessary as three black were elected from majority-white districts. Showing that federal intervention is unnecessary because of three elections. In his dissent, Justice Stevens argued that purpose refers to the attempt to discriminate not the attempt to engage in retrogression, meaning that if it "intends to deny or abridge voting rights because of race, it may not obtain preclearance," (373). Justice Breyer notes that the Bossier Parish School Board attempted to dilute the votes of blacks by doing everything possible in order avoid creating majority-minority districts (354 – 356). Further, Justice Breyer notes that §5 concerned making the situation better (progress) not preventing things from getting worse (preserving) (366). If the state relies on a plan to dilute the right of blacks to vote but there is no retrogression, then it should not be cleared.

and creates a conflict with §5. When the Georgia Governor desired to hold of a Republican surge in the state, the Democrats redistricted with an aim to reduce majority-minority districts to influence districts, increasing the chances of winning more seats though, at the same time, increasing the probability that a majority-minority district may not elect a candidate of their choice because of racial bloc voting and a low frequency of cross-over voting. Like the previous decisions, Justice O'Connor refused to rule that a violation of vote dilution under §2 provides evidence for retrogression under §5. If the state legislators can increase the chance for blacks to participate in the electoral process through the establishment of influence districts throughout the state even if they may lose seats, that is not retrogression.[214]

For the Conservatives, this change in jurisprudence reflects the need that integration and not segregation will lead to political reconciliation since blacks will be in influence districts and not majority-minority districts they will need to engage other coalitions in the political process. For the liberal justices, the new definition of retrogression contradicts the meaning of §5's command: "The power to elect a candidate of choice has been forgotten; voting power has been forgotten. It is hard to see anything left of the standard of non-retrogression, and it is no surprise that the Court's citers precedential support for his reconception, consists of a footnote from a dissenting

[214] *Georgia* v. *Ashcroft*, 539 U.S. 461, 489 (2004).

Opinion in *Shaw* v. *Hunt* and footnote dictum in a case from the Western District of Louisiana."[215]

The Color-Blind Constitution: A Conflicting Ethos of Judicial Restraint

Rejection of the color-blind constitution, especially in redistricting focus on the practical concerns and the rejection of the ideological implications. In *Shaw I*, even Justice O'Connor, in writing for the majority, notes that race-conscious districting is not always impermissible, only the race conscious districting that is "so extremely irregular" is unconstitutional.[216] Justice Blackmun thought the objection to the race-conscious districting is particularly ironic since the plan in question sent the first black representative to Congress since Reconstruction.[217] In *Bush* v. *Vera*, Justice Souter argues that a commitment to a color-blind Constitution would create further disparities between black members of Congress and the black population as a while, stating that majority-minority districts provide for the inclusion of more voices in the legislative process.[218] If Justice Thomas' view of the law were obtainable, these voices would be lost for the benefit of "reconciliation," even as the majority fails repeatedly to speak for the minority.

While the Conservatives Justices argue on behalf of the color-blind constitution, the Liberal Justices find themselves in the same position as Justice Frankfurter was in

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[215] *Georgia* v. *Ashcroft*, 539 U.S. 461, 495 (2004).

[216] *Shaw* v. *Reno*, 509 U.S. 630, 642 (1993).

[217] *Shaw* v. *Reno*, 509 U.S. 630, 676 (1993).

[218] *Bush* v. *Vera*, 517 U.S. 952, 1050 – 1051 (1996). Justice Souter cites Frank Parker, "The Damaging Consequences of the Rehnquist Court's Commitment to Color-Blindness Versus Racial Justice," *American University Law Review* 42 (1996): 770-771.

during Baker: the Court possesses no authority to enact that reading of the Constitution. In *Shaw II*, Justice Stevens attacked the majority for its attempt to articulate a new substantive right of color-blindness into the Constitution and in the districting process, which depends on the "speculative judicial suppositions about the societal message that is be gleaned from race-based districting."[219] Districting, according to Justice Stevens, concerns the classification of voters, both black and white, into geographical area and there would be very little difference for those who were placed into districts because of race and those who were not.

To attack the concept of the color-blind Constitution and the ethos of the Conservative Justices, the dissenters attack the ethos of the Court and the failure to adhere to the rhetorical tradition. In his *Shaw* v. *Reno* dissenting opinion, Justice Byron White writes that the majority's creation of a new constitutional harm on the basis that a districting plan segregates its citizens supports a logic whereby, "race-conscious redistricting that 'segregates' by drawing odd-shaped lines is qualitatively different from race-conscious redistricting that affects groups in some other way."[220] According to Justice White, race-conscious districting is constitutionally permissible up until the point it is impermissible, meaning that the base-by-case constitutionality rests on the aesthetic judgment of the justices, which echoes the constitutionality on Justice Potter Stewart's

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[219] *Shaw* v. *Hunt*, 517 U.S. 899, 924 - 925 (1996).

[220] *Shaw* v. *Reno*, 509 U.S. 630, 667 (1993).

seminal phrase, "I know it when I see it."[221] When considering the constitutionality of a redistricting plan and providing a new threshold level for judicial skepticism of legislative discretion, especially in light of the "analytically distinct" cases, the federal judiciary must proceed by a case-by-case basis and examine each district turn on a line-by-line basis, questioning the motives of the state legislators with each potentially invidious turn and diminishing the ethos of judicial restraint with every case that strikes down cases involving vote dilution.

In *Bush* v. *Vera*, Justice Kennedy states that in order to preserve the legitimacy of the Supreme Court, the Justices must follow the precedent of the "analytically distinct" case, allowing state legislators to follow their decisions and principles that "play an important role in defining the political identity of the American voter."[222] Yet, the precedent for precedent's sake argument by Justice Kennedy echoes Justice Frankfurter's argument of authority in *Colegrove*, which the Supreme Court would later reject in *Baker*. With the progression of cases in the area of the VRA, the Supreme Court may not establish a new rhetorical tradition as it did in Baker to combat the expansion of the Supreme Court's authority in this area of case law.

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[221] *Jacobellis* v. *Ohio*, 378 U.S. 184, 197 (1964). *Jacobellis* concerns whether or not the manager of a move theater violated a state obscenity law by exhibiting a "pornographic" film. The Supreme Court overturned the District Court's decision and ruled that the film in question was not obscene. In his concurring opinion, Justice White writes from a viewpoint of realism that he, "shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."

[222] Bush v. Vera, 517 U.S. 952, 985 – 986 (1996). The Shaw line of precedent includes *Shaw I*, *Miller*, *Hays*, *Shaw II*, *Bush v. Vera*, *Hunt* v. *Cromartie,* and *Easley* v. *Cromartie*.

Throughout the "analytically distinct" cases and the challenges to §5 of the VRA, the dissenting Justices believe that the Courts engage in the expansion of judicial authority at the expense of judicial restraint and the discretion of state legislators. The dissenters of Justice Stevens, Justice Souter, Justice Ginsburg, and Justice Breyer attack the majority for substituting its judgment for the judgment of the state legislator when there is no constitutional injury.[223] In *Miller* v. *Johnson*, Justice Ginsburg writes that in the "analytically distinct" cases, strict scrutiny will be triggered as the necessary form of judicial review when the judiciary believes that "traditional districting principles" has been "given less weight than race."[224] Because of this review, state legislators will potentially face a legal challenge if they redistrict by creating majority-minority districts to prevent vote dilution under the requirements of §2 and, in the process of creating those districts, they rely on race as the predominant factor if the district lines represent a "bizarre" standard.[225] Without a clear definition or standard for "race as a predominant factor," the majority of the Supreme Court ensures that the federal judiciary will determine the aesthetics of the districting plan. Further, as Justice Stevens notes in *Bush* v. *Vera*, the majority of the Supreme Court brings the federal judiciary further into the political process that rightly

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[223] The dissenters reject the reasoning of the Court since they believe there is no constitutional harm in the first place. In Shaw II, Justice Stevens states that "absent some demonstration that voters are being denied fair representation as a result of their race, I find no basis for this Court's intervention into a process by which federal and state actors, both black and white, are jointly attempting to resolve difficult questions of politics and race that have long plagued North Carolina." *Shaw* v. *Hunt*, 517 U.S. 899, 950 -951 (1996).

[224] *Miller* v. *Johnson*, 515 U.S. 900, 934 (1995).

[225] *Bush* v. *Vera*, 517 U.S. 952, 1038 (1996).

belongs to the discretion of the state legislators, increasing the characterization of the Court that it is political and not impartial.[226]

For the Supreme Court to require the implementation and justification of sound traditional districting principles in the "analytically distinct," the casual observer would note the lack of reciprocity in other areas of the Supreme Court's redistricting rhetorical tradition. In *Shaw I*, Justice Stevens notes that the Supreme Court has never ruled that traditional districting techniques e.g. compactness, contiguity, respecting political boundaries, are constitutionally required, and, since there is no justification for why there should be a departure in principle for all cases, these techniques should not be required for just some of the cases.[227] Even when state legislators follow traditional districting principles, the federal courts can strike down the districts because they did not follow them enough. In *Miller* v. *Johnson*, Justice Ginsburg attacks the majority's decision by noting that the design of the district in question provides a sign that the "design reflects significant consideration of 'traditional districting factors (such as keeping political subdivisions intact) and the usual political process of compromise and trades for a variety of nonracial reasons.'"[228] In *Bush* v. *Vera*, Justice Souter notes that the problem since *Shaw I* is a problem of pragmatism as the majority of the Supreme Court fails to deliver any

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[226] *Bush* v. *Vera*, 517 U.S. 952, 1038 (1996).

[227] *Shaw* v. *Reno*, 509 U.S. 630, 686 – 687 (1993).

[228] *Miller* v. *Johnson*, 515 U.S. 900, 940 (1995). In this passage, Justice Ginsburg cites a dissenting opinion from the District Court's decision.

adequate and "objective" standards in terms of compactness.[229] If the Supreme Court were to provide an adequate conception of compact rather than leaving compactness to the aesthetic tastes of the Justices and the judiciary, then the majority would have at least provided a manageable standard and reconciled its §2vote dilution claims with the "analytically distinct" claims.

Further, the contradiction within the Supreme Court's ethos occurs as it allows state legislators to relying on race when creating majority-white districts. A Constitutional requirement of color-blindness would create a double standard between communities of interests. Since state legislatures know the racial demographics of the state while districting, it would be extremely difficult to avoid relying on the state's demographics to create districts without the use of race. As J. Morgan Kousser argues, "'Color-Blind' is a the buzzword of opponents of governmental actions to diminish current racial inequality, inequality that results from past and continuing governmental action."[230] When employing cartographers, the color-blind principle would submerse voters into districts and, if the state legislators or citizens could not alter the attitudes that create racial-bloc voting, vote dilution would exist without any recourse.[231]In his dissenting opinion in *Bush* v. *Vera*, Justice Stevens examines the districts with a level of specificity that Justice O'Connor did not by examining the twist and turns of a majority-minority district with

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[229] *Bush* v. *Vera*, 517 U.S. 952, 1057 (1996).

[230] J. Morgan Kousser, *Color-Blind Injustice,* 10.

[231] *Bush* v. *Vera*, 517 U.S. 952, 1072 (1996).

twists and turns of a neighboring majority-white district to show while bizarre shaped districts are not allowable when race is the "predominant factor" but it is allowable for partisan interests or for majority-white districts.[232] The irony of the double standard, as Justice Stevens notes, is that white citizens will be able to request their position in the electoral map to maximize representation though racial minorities will not possess the same constitutional authority to do the same if that reside outside of a "natural compactness." Consequently, "the result… involves 'discrimination' in a far more concrete matter than did the odd shapes that so offended the Court's sensibilities."[233]

Complicating the racial gerrymandering and vote dilution cases is the notion racial gerrymandering serves as proxy for partisan gerrymandering. Though the Supreme Court does not concern itself with partisan gerrymandering cases as there is no manageable standard, a notion that itself is quote controversial for members of the Supreme Court, John Hart Ely and Samuel Issachaoff argue that partisan redistricting creates a far more serious constitutional and representational harm than racial gerrymandering.[234] Throughout the vote dilution and analytically distinct cases, partisan politics guides the redistricting process and the redistricting challenges to the point that race and partisan interests are inseparable. In *Shaw I*, *Miller*, *Shaw II*, and *Vera*, the dissenters from each

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[232] *Bush* v. *Vera*, 517 U.S. 952, 1019 (1996). Justice Stevens examines three majority-white districts that are "bizarre" in shape and far from compact though the majority of the Court fails to examine these. Justice Stevens argues that these districts constitute a larger partisan gerrymander.

[233] *Bush* v. *Vera*, 517 U.S. 952, 1057 (1996).

[234] See John Hart Ely, "Gerrymanders: The Good, The Bad, The Ugly," *Stanford Law Review* 50 (1998); Samual Issacharoff, "Gerrymandering and Political Cartels," *Harvard Law Review* 116.2 (2002): 593 – 648.

provide a reasonable political motive for developing the districts in question, focusing on following the directions of the Attorney General, incumbent protection, legislative trade-offs, developing communities of interests, and protecting the state from advancements from the other political party. For example, in *Miller*, Justice Ginsburg discusses that on of the reasons why the challenged district possesses a bizarre shape is that because a State Senator desired a district to include an area in which his son lived so that the son could replace the father when the father stepped down.[235] Under this consideration, partisan interests through the protection of incumbents and the commands of the DOJ would be the "predominant" factor in drawing the lines and not race. In *Bush* v. *Vera*, Justice Stevens examines the history of the challenged districts to show that the Texas State Democrats considered where to create new districts in Democratic territories, how to move voters to fill the districts and protect incumbents, how to discern political affiliation of voters, how to determine voting patters at the precinct level, and how to force the shape of the district to meet these ends. Further, he notes that since African-Americans residents in a particular community consistently vote for Democrats 97% of the time then it is neither irrational nor invidious to conclude that the districts in question were drawn on account of partisan interests and not race even is race and partisan interests correlate.[236] Justice Steven concludes by stating, "to the extent that race served as a proxy at all, it did

[235] *Miller* v. *Johnson*, 515 U.S. 900, 942 (1995).

[236] *Bush* v. *Vera*, 517 U.S. 952, 1031 (1996).

so merely as a means of 'fine tuning' borders that were already in particular locations for primarily political reasons."[237]

In *Shaw II,* Justice Steven argues that the partisan interests in the case overpower the racial considerations of the case. He notes that Democrats in the North Carolina Assembly desired to create only one majority-minority district and Republicans desired two but the Democrats followed the mandates from the DOJ to create a second majority-minority district as it protected the party's incumbents.[238]He states that that those bringing forth the challenge are Republicans and the district in which they challenge is Democratic. Since the original challenge in *Blue* v. *Pope* covers partisan gerrymandering, Stevens states that the real concern for the plaintiffs is that they do not desire to be represented by a Democrat since they prefer Republicans.[239] Because of political and ideological differences, the plaintiffs' argument is that the will suffer a "representational harm" since the Democratic Congressional Representative will not adhere to the interests of all of the voters in the district. Because the partisan gerrymander failed in the district courts and because the Democrats drew a district to protect an incumbent and prevent Republicans from gaining more seats, Republican citizens challenged the districts on the only grounds that they could, claiming that the district constituted a racial gerrymandering. Since the Republicans do not need to show that they have been shut out of the process or that the representation is not responsive to the needs of the people, the citizens hope that the

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[237] *Bush* v. *Vera*, 517 U.S. 952, 1014 - 1033 (1996).

[238] *Shaw* v. *Hunt*, 509 U.S. 899, 937 - 938 (1996).

[239] *Shaw v. Hunt*, 517 U.S. 899, 920 (1996). See *Pope* v. *Blue*, 809 F. Supp. 392 (WDNC 1992).

Court will strike down the district, which may lead to an increase of partisan representatives and, further, the ideological imposition of a color-blind constitution that may further help representational aims. Because of the close connections between race and politics, a group can redistrict without constraints to reduce the influence of a rival political party and discriminate against citizens because of political views and, in the process, diminish the influence of both a racial minority and a political group.

Finally, complicating the ethos of the Conservative majority, the Justices do not reconcile the harms of racial gerrymandering with the harms of political gerrymandering or the harm in any form of "virtual" representation. While the "bizarre" majority-minority districts may cause, but more likely increase, resentment based on racial attitudes as well as partisan interests, the Supreme Court does not explicitly address why the resentment against majority-minority districts trumps the establishment of political equality for racial minorities. From the history of racial bloc voting and the use of racial appeals in campaign ads, it is apparent that there is less concern about the resentment that racial minorities feel over unresponsive representation. When this power structured is challenged, it amounts to a constitutional harm based on a perceived societal message of segregation and separation.

In 2004, the Supreme Court decided *Vieth* v. *Jubelirer* and, two years later, the Justices decided *L.U.L.A.C.* v. *Perry*. Even though both of these cases were partisan gerrymandering cases, a plurality of the Court ruled in the first case that partisan gerrymandering constituted a non-justiciable question and a majority of the Supreme

Court found that the Texas Republicans diluted the votes of racial minorities in two Southern Texas districts. Acing as the swing vote in both cases, Justice Kennedy's judgment and opinions possess the ability to recognize partisan gerrymandering as an unconstitutional cognizable harm or reject the ability to raise a constitutional claim concerning vote dilution. In *Vieth,* Justice Kennedy raises prudential concerns as he does not desire the federal judiciary examining every electoral district and create an "unprecedented intervention in the American political process."[240]In rejecting the partisan gerrymandering claims in *Vieth*, Justice Kennedy argued there are no comprehensive and neutral principles to guide districting and that there is no cognizable judicial limitation, allowing the judiciary to assume the political and not legal responsibility for districting. In his controlling concurrence, Justice Kennedy does not address the differences between *Vieth* and the "analytically distinct" cases and for good reason for if he did, he would need to explain the contradiction of judicial involvement in one area of redistricting law but judicial restraint in another. For if the principles required in one set of cases are not neutral, then they should not be neutral in another set of cases; and if the fear is that there will be no way to discern where the judiciary's power ends for one set of cases, it should be clear that there may not be an end in other cases.

In *L.U.L.A.C.* v. *Perry*, Justice Kennedy states that the plan by Texas Republicans violates §2 of the VRA by diluting the votes of a coherent racial minority in the face of

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[240] *Vieth* v. *Jubelirer*, 541 U.S. 267, 306 (2004). From this statement, Justice Kennedy thinks that it is appropriate raising concerns over racial gerrymandering since those districts are much fewer and exist in areas of racially polarized voting where are partisan claims occur in every district where members of two different parties run for office.

racial bloc voting to protect a Republican candidate that the Latino community would have voted out of office and the creation of another Latino opportunity district did not correct the original problem. As Ellen D. Katz notes, the Supreme Court's decision about vote dilution rests not with the traditional districting principles but over the fact that the Latino community was political active and their districts competitive, allowing for discourse to facilitate the election process.[241] Justice Kennedy's conclusions in this case suffer from the same crisis in ethos that undermines the analytically distinct cases. As Pamela Karlan states, in *L.U.L.A.C.* Justice Kennedy attempts the same inquiry for a vote dilution case that he says cannot be done for a political gerrymandering case.[242] John Hart Ely notes, the Supreme Court's decision in *Shaw I*, which set a standard of "bizarreness" and constituted "compactness" as a virtue may be a better standard to contain both racial gerrymandering and partisan gerrymandering.[243] Yet, for this to occur, the citizens would need to elect a President that would nominate enough Supreme Court Justices to reestablish an analytical frame to declare partisan gerrymandering justiciable. This would need to occur before a President would nominate a Supreme Court Justice who would fulfill the "Rule of Five" for the color-blind Constitution.

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[241] Ellen D. Katz, "Redistricting: Reviving the Right to Vote," *Ohio State Law Journal* 67 (2007): 1164.

[242] Pamela S. Karlan, "New Beginnings and Dead Ends in the Law of Democracy," *Ohio State Law Journal* 68 (2007): 758.

[243] John Hart Ely, "Gerrymanders: The Good, the Bad, The Ugly," 622 – 623.

Conclusion: The Color-Blind Voting Rights Act

In June of 1986, the Supreme Court released decisions in *Davis* v. *Bandemer* and *Thornburg* v. *Gingles*, which initiated the Supreme Court's protection of a group right to vote. Seven years after those decisions, the Supreme Court altered its course, protecting groups in some cases while rejecting a group right to vote in other cases. Consequently, throughout the 1990s and 2000s, the Justices on the High Court released opinions that created a contentious rhetorical tradition. While the goal of the Supreme Court focused on the development of common ground to pursue racial reconciliation, ideological divisions prevented the Justices from establishing a unified voice to speak for "the people." In order to pursue racial reconciliation, the Conservative Justices argued that representation must concern the individual and state legislators must focus on the characteristics of the individual, limiting the extent to which groups can receive representation as a result of the districting process. At some point, state legislators cross a constitutional threshold where districts inflicts a perceived communicative harm on citizens even if the five Justices who support this notion are the only ones that "know" when legislators cross the line. Conversely, the Liberal Justices on the Court argue that political equality for ethnic and racial groups must exist in a redistricting plan prior to racial reconciliation. In this view, the Liberal Justices place an unwarranted leap of faith that state legislators from states in which racially polarized voting exists will develop deliberative space for minorities who have been historically shut out of the political process. To diminish the authority of state legislators to conduct redistricting for political

groups is to increase, without good reasons, the scope of judicial power. The Conservative Justices desire this interpretation on normative grounds while the Liberal Justices reject it on empirical grounds. This debate, which the Supreme Court initiated in Shaw I continued through the Court's 2006 decision in *L.U.L.A.C.* without any resolution. Consequently, in the balance of racial reconciliation concerns an interpretive struggle over whether or not the Constitution provides a substantive right to a color-blind districting process.

In the legal community, the decisions by the Supreme Court in the analytically distinct cases have not been well received. In gauging the reception of the analytically distinct cases, consensus reveals that the "bizarre" standard from *Shaw I* and the "Predominant Interest" test from *Miller* are "incoherent" and "unmanageable."[244] Pamela Karlan writes that the Supreme Court's decision on race and redistricting, "bring to mind two of America's most distinctive philosophers, Walt Whitman and Yogi Berra. Whitman once proclaimed, 'Do I contradict myself? Very well then ... I contradict myself; I am large ... I contain multitudes.' Yogi, a bit more succinctly, observed that 'It ain't over 'til it's over,' and asked, 'How can you think and hit at the same time?'"[245] Karlan states that the Court seems to be in a process of "Redrupping" state and congressional districts: "reviewing challenged districts one by one and issuing opinions that depend so

[244] See John Hart Ely, "Gerrymanders: The Good, the Bad, and the Ugly," which states that even though both are bad Shaw is better than Miller since the virtue of compactness would prevent racial and political gerrymanders (614).

[245] Pamela S. Karlan, "Still Hazy After All these Years: Voting Rights in the Post Shaw Era," *Cumberland Law Review* 26 (1996): 287.

idiosyncratically on the unique facts of each case that they provide no real guidance to either lower courts or legislatures."[246] Richard H. Pildes writes that in one of the most controversial courts cases of the 1990s, the Supreme Court "imposed critical, but vague, constitutional constraints on the use of race in election-district design," as the Court set out to decide at what point the "use of a permissible consideration of race becomes impermissible.[247]

The unintentional effect of the case-by-case jurisprudence may be the decrease in amount of cases brought before the Supreme Court. Karlan writes that a decade after the Court's decision in *Shaw I*, in which some but not all uses of race is constitutionally permissible, the Court "remains unable to articulate a workable, intelligible regime telling the political branches how to act during the most political activity they undertake?"[248] Though vague, Pildes claims that the law stabilized after *Shaw* as risk averse politicians avoided districting plans that would bring litigation since, as a consequence, courts may draw their own plans or the political landscape may shift before the case returned from litigation.[249] Samuel Issacharoff writes that the uncertainty of the law from *Gingles* to *Shaw*

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[246] Pamela S. Karlan, "Still Hazy After All these Years," 287. According to footnote 7, "Redrupping" refers to the Court's practice, in the six years between *Redrup* v. *New York*, 386 U.S. 767 (1967), and *Miller* v. *California*, 413 U.S. 15 (1973), of summarily deciding obscenity cases without developing any legal standards that the lower courts could readily apply. Redrupping essentially turned the Court into a national "board of censorship."

[247] Richard H. Pildes, "The Constitutionalization of Democratic Politics," *Harvard Law Review* 118 (2004): 67.

[248] Pamela S. Karlan, "Lessons for Getting the Least Dangerous Branch out of the Political Thicket," *Boston University Law Review* 82 (2002): 673.

[249] Richard H. Pildes, "The Constitutionalization of Democratic Politics," 68.

to *Miller* develops from the Supreme Court's decision in *Carolene Products*', whose famous "Footnote 4" argues that the Supreme Court must intervene when the normal political process does not work.[250] Luckily for the Justices, they will have another opportunity to sort out this mess.

[250] Samuel Issacharoff, "Groups and the Right to Vote," *Emory Law Journal* 44 (1995): 872.

CHAPTER VII

CONCLUSION: VISIONS OF DEMOCRACY AND THE DEVELOPMENT OF THE DEMOCRATIC EXPERIENCE

On October 14th, 2008, the Supreme Court will hear oral arguments in the case of *Bartlett* v. *Strickland*, 07-689 (2008) the sixth case to reach the Court from redistricting efforts by the North Carolina General Assembly. The question in this case concerns §2 of the Voting Rights Asks and asks the Supreme Court: "whether a racial minority group that constitutes less than 50% of a proposed district's population can state a vote dilution claims?"[1] The case, the results of which will play a significant role for the reapportionment battle following the 2010 census, developed from a claim that the General Assembly violated the constitutions norm of protecting county integrity by slicing one county into two districts in order to comply with §2 of the VRA and protect a district 39% of whom are African-American.[2]

In terms of its rhetorical tradition, the Supreme Court has failed to reach a conclusion as to whether or not a vote dilution claim can be maintained by a minority group that does not constitute a majority in the district. In *Gingles*, the Court states that to prove a vote dilution claim, the minority group must be compact enough to constitute a majority in a district. In *Voinovich* v. *Quilter*, the Supreme Court discussed the possibility that a minority group could establish a vote dilution claim if it was not a majority but

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[1] 07-689 *Bartlett* v. *Strickland*, 2008.

[2] *Bartlett* v. *Strickland*, *On The Docket: U.S. Supreme Court News* 17 March 2008 http://onthedocket.org/cases/2008/bartlett-v-strickland

received cross-over voting though it refused to rule on that claim.[3] In *L.U.L.A.C. v. Perry*, the Court held that district 24, a district around Dallas that was represented by D- Martin Frost, but split-up to allow for the election of a Republican. State that the African-American voters did not constitute a majority under *Gingles* as they only comprised 25,7% of the district. However, according to the majority, the group failed to show that it could elect a candidate of choice in the Democratic primary even though it regularly comprised 68% of the vote during the primaries. Writing for the majority, Justice Kennedy wrote that since the district was created for Representative Martin Frost, there was no benchmark in place to determine vote dilution since Frost possessed no opposition in a primary since his incumbency began. [4] In a similar district an African-American candidate failed when he ran against an Anglo-candidate, Anglo-Democrats and not African-American Democrats control the district.[5]

At issue in *Strickland* v. *Bartlett*, 361 N.C. 491; 649 S.E.2d 364 (2008), is whether or not a crossover district that was created to enhance the ability of a racial minority community to influence election but violated the Whole County Provision of the North Carolina Constitution was constitutional.[6] Anticipating that the Department of Justice

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[3] *Voinovich* v. *Quilter*, 507 U.S. 146, 154 (1993); See also *Johnson* v. *De Grandy*, 512 U.S. 997, 1009 (1994).

[4] *L.U.L.A.C.* v. *Perry*, 548 U.S. 399, 443 - 444 (2006).

[5] *L.U.L.A.C.* v. *Perry*, 548 U.S. 399, 443 - 444 (2006).

[6] *Strickland* v. *Bartlett*, 361 N.C. 491, 493; 649 S.E.2d 364 (2008). The Whole County Provision requires that no county shall be divided to create a electoral district for the State's House or Senate. However, as the State Supreme Court notes, federal law is supreme and this state constitutional requirement would be subject to the Supreme Court's reapportionment and redistricting jurisprudence.

may require a majority-minority district in the Southeastern portion of North Carolina, the state legislators created a district that split Pender County but resulted in the creation of an "effective black voting district," that contained an African-American population of 42.89 percent, and an African-American voting age population of 39.36 percent."[7] Plaintiffs, who desired that a unified Pender County receive representation, challenged this district because it failed to meet the first condition of the *Gingles* test, which states that a minority must be "sufficiently large and geographically compact to constitute a majority in a single-member district."[8]

In its decision, the North Carolina State Supreme Court defined "majority" narrowly, focusing on only those citizens who are of voting age since §2 focuses on the act of voting.[9] As a result of the narrow definition, the North Carolina State Supreme Court found that the district in question was not necessary under §2 and the state legislators need to follow the Whole County Provision. Unless a minority group can show it possesses the voting strength to be a majority, the North Carolina State Supreme Court reasons that it cannot be subject to vote dilution.[10] Further, if the judges were to rule that the influence district in question is necessary under §2 with the crossover voting from

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[7] *Strickland* v. *Bartlett*, 361 N.C. 491, 493 - 495; 649 S.E.2d 364 (2008).

[8] *Thornburg* v. *Gingles*, 478 U.S. 30, 50 (1986).

[9] *Strickland* v. *Bartlett*, 361 N.C. 491, 500 - 502; 649 S.E.2d 364 (2008).

[10] *Strickland* v. *Bartlett*, 361 N.C. 491, 504; 649 S.E.2d 364 (2008).

whites, then there may be a contradiction in the *Gingles* test as the district in question would not occur within the context of racially polarized voting.[11]

In a dissenting opinion, Chief Justice Sarah Parker and Associate, and now current Chief Justice, Patricia Timmons-Goodson, who is the first African-American women to serve on the North Carolina State Supreme Court, argues that the majority's definition of "majority" exceeds the definition by the Supreme Court as *Gingles* refuses to qualitatively define what constitutes a majority so as to include influence districts and reject a mathematical rigidity imposed on state legislators.[12] Further, the dissenting justices argue that *I*n *L.U.L.A.C.* Justice Kennedy states, in dicta, that a §2 claim could, in theory, apply to minority groups large enough to influence an election with some cross-over voters.[13] This, of course, returns us to the most important question in the recent Supreme Court decisions: how much is too much? When the Supreme Court decides *Bartlett* v. *Strickland*, it must answer how many members of a political group creates a majority and to what extent state legislators can employ their discretion to constitute a majority within a district.

Giving the Supreme Court's history, the Supreme Court will most likely provide another 5 – 4 decision with Justice Kennedy providing the swing vote. While one plurality comprised of Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice Alito will discuss the use of race in districting and another plurality will discuss communities of interest and the need to defer to the state legislators since this is a delicate decision.

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[11] *Strickland* v. *Bartlett*, 361 N.C. 491, 506; 649 S.E.2d 364 (2008).

[12] *Strickland* v. *Bartlett*, 361 N.C. 491, 514; 649 S.E.2d 364 (2008).

[13] *Strickland* v. *Bartlett*, 361 N.C. 491, 515; 649 S.E.2d 364 (2008).

During the oral arguments, the counsel attacking the plan will attempt to persuade Justice Kennedy that the Constitution really is color-blind and that the General Assembly created the bizarre district with race as the predominant factor, ignoring the traditional and constitutional principle of not separating counties. Conversely, the counsel defending the plan will say the design of the district is necessary to prevent vote dilution under §2 and, possibly, discuss the partisan motivations of the district. Regardless of Justice Kennedy's decisions, Clarence Thomas will write an opinion that cites *Holder* v. *Hall*, drawing attention for the need for the judiciary to establish a color-blind Constitution and to leave apportionment and districting to the legislature, which presents an irony that Justice Thomas refuses to comprehend. The only questions that remain are: will Justice Thomas finally receive his fifth vote? Will the Court overturn the VRA? Will the Court just continue to hollow-out the VRA? Will the Court abandon its "predominant motive" test? Or, will Justice Kennedy continue to side with the Liberal Justices because of the conflation of race and politics?

The Supreme Court and the Democratic Experience

The Supreme Court's decision in *Bartlett* v. *Strickland* will be the next moment in which the Justices to determine the meaning of the democratic experience for the American polity. In this decision, like its other decisions, the Justice will intellectual and ideologically grapple with the extension and limitation of voting rights for individuals and groups, citizens and state legislators, legislators and justices. The Justices will determine to what extent citizens and state legislators can create and sustain a political group in society

and to what extent other citizens can prevent the formation of political groups in the political process. The Justices will determine to what extent the state legislators of North Carolina must anticipate and comply with federal law even over the requirements of their own state's constitution.

This dissertation seeks to explore the development of the democratic experience and the constitution of American democracy through the Supreme Court's reapportionment and redistricting decisions. For the development of the study of rhetoric, this text examines the connection between our political institutions and the development of political deliberation, especially in the way in which the Supreme Court of the United States transformed our political institutions, legally and morally, from a Constitutional Republic to a Constitutional Democracy. First, this dissertation examines the way in which our political institutions, such as election and the decisions of the Supreme Court, enhance or constrain the ability of the American public to engage in democracy and self-government. As a heresthetical strategy, state legislators rely on districting to produce desired electoral results. Because of its involvement, the Supreme Court reconstituted the practice of representation and the protection of representation in our political institutions. Second, the study examines the development of an ethos for the American democracy. Since the Supreme Court's decisions in the reapportionment revolution, the Supreme Court's decisions focus on the development of the democratic experience to improve upon the quality of public deliberation and the meaning of American democracy. Finally, this dissertation examines the creation of a judicial ethos to decide

reapportionment and redistricting cases. Throughout the Supreme Court's decisions, the Justices invent and reinvent a rhetorical tradition that concerns the ability of Justice to decide apportionment cases. In the process, the Justices develop an authority of when it ought to decide cases and when it should abstain from deciding cases. Consequently, the development of reapportionment concerns the development of judicial will to decide cases and their justifications for deciding or refusing to decide new cases.

Throughout the development of the American Republic, state legislators have employed redistricting as a heresthetical strategy to achieve desired electoral results. The infamous redistricting attempt in Massachusetts of 1812 represented a continuation of redistricting efforts since Colonial times and a preview of redistricting efforts to come e.g. Texas in 2004. While the effects of a redistricting plan are not always predictable, especially from election to election, as the results of the infamous 1812 gerrymander lasted only one year, the opportunity to gain control of a state legislator, even for the short term, provides warrant to attempt a partisan redistricting, especially if one political party can coordinate efforts to create a national advantage.

Though the evils of redistricting is pervasive throughout the history of American politics, during the nineteenth century, state and federal legislators and state courts developed cures for the political poison. In response to partisan redistricting efforts, state legislators in Alabama, Massachusetts, and Maine passed regulations, such as requiring contiguity, preserving counties, and rejecting single-member districts. By the end of the nineteenth century, state courts entered the political thicket to provide citizens relief in

reapportionment and redistricting controversies though, in those decisions, the state courts decided the issues based on the constitutional redistricting requirements. Though these decisions did not provide sweeping reform, they did establish precedent for judicial involvement in election law to protect the voting rights of citizens.

At the federal level, between 1842 and 1911, Congress passed redistricting acts that required contiguous single-member districts that contained equal population and were compact. However, after it enacted redistricting legislation in 1911 that renewed these requirements, Congress chose not to pass legislation that required state legislators to follow certain guidelines. At the same time that Congress passed its last law that contained redistricting requirements, the Supreme Court initiated a rhetorical tradition in apportionment law as it entered the political thicket in *Richardson* v. *McChesney* to declare that this case failed to present a justiciable controversy.

Even though the Supreme Court declined to intervene in Richardson v. McChesney, the issue returned to the High Court because of continued neglect of apportionment by state legislators. Though the Justices consistently ruled against judicial involvement, each time the High Court heard oral arguments in apportionment decisions it stepped further and further into the thicket. In *Smiley* v. *Holm*, *Koenig* v. *Fylnn*, *Carroll* v. *Becker,* and *Wood* v. *Broom* the Supreme Court decided which branch of government could participate in the apportionment process, what would happen if a state received additional representation or faced cuts in its current representation, and whether or not the Congressional standards of 1911 still applied to redistricting. When the Supreme Court

decided *Colegrove* v. *Green* in 1946, a divided court ruled against judicial interference in apportionment law though, historically, this decision just delayed the inevitable. Fourteen years after *Colegrove*, the Supreme Court released its unanimous decision in *Gomillion* v. *Lightfoot* and initiated a new rhetorical tradition that replaced its previous rhetorical tradition of judicial abstinence in apportionment law.

Throughout its rhetorical tradition on apportionment law, the Justices who opposed judicial involvement in redistricting argued that reapportionment law presented a "political question" and the state legislators possessed the authority to determine the meaning of a ballot even if electoral maps created inequalities and favored smaller segments of the voting population. However, when City officials from Tuskegee, Al, created a districting plan that removed almost the entire African-American population from the city's limits to ensure that they would not receive city services, the Supreme Court argued that the actions of the city officials violated the Fifteenth Amendment. Yet, according to its previous rhetorical tradition in apportionment law, the decision by the City officials constituted a "rational" policy decision and the citizens who were removed from the city limits could still "vote" and have their vote "counted" like other citizens. Consequently, at issues in *Gomillion* was not the right to vote but the right to cast a meaningful ballot. Though the Supreme Court ruled that this redistricting plan violated constitutional standards, the most important aspect of the High Court's decision was to weaken its Pre-Apportionment Revolution rhetorical tradition beyond repair.

Sixteen years after its decision in *Colegrove*, the Supreme Court released its decision in *Baker* v. *Carr*. The Court's decision in *Baker* represents a turning point in reapportionment law, the conceptualization of law in society, and the role of the Supreme Court in American public life. In *Baker*, Justice William J. Brennan presents the American people with a new vision of the law and, consequently, a new ethos of the Supreme Court. Instead of defining reapportionment as a social or political right that depends on the judgment of the state legislators, Justice Brennan argues that voting rights are best understood as a fundamental right in society that stand above the discretion of state legislators. Since the state legislators refused to reapportion to protect the voting rights of their constituents it would be necessary for the High Court to protect the Constitutional rights of "the people." Yet, in order to protect the rights of "the people," Justice Brennan diminished the definition of the "political questions" and removed the obstacle to judicial involvement in apportionment law as well as other areas of law.

In addition to redefining apportionment law as a fundamental right, Justice Brennan's decision in *Baker* presented the American people with a new vision of the law and a new authority for the judiciary in American society. After *Baker*, apportionment law would no longer follow Justice Felix Frankfurter's conception of the law, which argues that the Justices must follow correct rules for deciding a case; instead, apportionment law would follow the vision of Justice Brennan and Justice William O. Douglas, which argues that the law must follow the experiences of the people. While Justice Frankfurter argued that "the people" must be vigilant and "sear the consciences" of their representatives,

Justice Brennan and Justice Douglas argued that sixty years of experience revealed that the vigilance of the people failed to convince state legislators to overlook their interests and fairly apportion their respective states.

By creating a new vision of the law, Justice Brennan offered the American people a proposition about the role of the Judiciary in American pubic life. In *Baker*, Justice Brennan argued that because state legislators refused to reapportion their state and failed to provide citizens with an effective voice in government, the Court would provide a corrective reading of the political process and open up the federal courts to hear apportionment cases. However, if the Courts were to hear apportionment cases, the judiciary would need to be the final arbitrator of the Constitution, increasing its authority over the other branches of government. However, while the Court increased its authority to protect the voice of "the people," the Supreme Court created an ethos of judicial restraint and employed apportionment and districting topoi, such as apportionment is the primary responsibility of state legislators, to enact this ethos.

The Supreme Court's decision in *Baker* provided the foundation for the development of the democratic experience. According to Chief Justice Earl Warren, *Baker* and *Reynolds* v. *Sims* were the Supreme Court's most important decisions, even more important than *Brown* v. *Board of Education*, as the two reapportionment decisions restructured power to allow citizens a greater ability to participate in the political process. In the *Gray* v. *Sanders*, *Wesberry* v. *Sanders*, and *Reynolds* v. *Sims*, a majority of the Supreme Court fulfilled Abraham Lincoln's promise of democracy by instituting an ideology of

political equality in apportionment law. For a majority of the Supreme Court, the legitimacy of a democratic government concerns the development and enhancement of the democratic experience. Instead of restricting the right to vote and participate in government, the majority of Justices argue that the best vision of democracy concerns the expansion of the right to vote and the ability of citizens to express their political will and engage in self-government through the right to vote.

By expanding the rights of citizens to participate in government, the Supreme Court restricted the ability of state legislators to use their discretion to promote the interests of the state before citizens could vote on those interests. Rather than promote the interests of a certain segment of society, i.e. the rural interests, at the expense of the polity as a whole, the Supreme Court's Reapportionment Revolution decisions recreate the public space of elections to argue that the experience of the American democracy requires political space in which citizens can utilize their voice to determine the distribution of resources throughout the state. Consequently, with the advancement and development of the American democracy, political institutions at the local, state, and federal level could no longer be characterized as republican in nature, especially in regards of the ability of state legislators to develop "rational" apportionment and districting plans to protect the interests of the states.

While reapportionment cases during the 1960s focused on the development of political equality, the cases during the 1970s and 1980s focused on an ideology of political fairness, especially in terms of the development of democracy for racial minorities and for

political parties. During this time, the Justices rarely, if ever, challenged the Court's decisions in *Baker*, *Wesberry*, and *Reynolds*— the legal and moral foundation of American democracy and the institutionalization of political equality— though Justices debated the extent to which political fairness should govern the redistricting process. Because political equality was malleable enough, citizens possessed an equal voice in the process though this voice was not always meaningful, especially in the face of racial and political gerrymandering. Though the Justices accepted the tenets of the Reapportion Revolution, the debated the ideology of political fairness in regards to representation.

Conservative Justices argued that representation concerned authorization, where the people possessed political equality though democracy was limited to the ability of state legislators to filter the process of representation to fit their needs and not necessarily the needs of the people's. For this vision of representation to succeed, voting constituted an individual right and not a group right. For example, in *Gaffney* v. *Cummings,* Conservative Justices allowed state legislators the ability to create an electoral map that provide political fairness to the political parties yet, in *Davis* v. *Bandemer*, the Conservative Justices argued against a conceptualization of political fairness for citizens. In *Beer* v. *United States* the Conservative Justices expanded voting rights to provide only a minimal level of group representation even under protection of the Voting Rights Act. In *Mobile* v. *Bolden*, the conservative Justices refused to allow for a group right of representation for racial minorities. Consequently, in order to expand protection under the VRA for racial

minorities, Congress amended §2 to protect group representation for racial minorities, which would lead to further controversy during the 1990s and 20002.

Conversely, the Liberal Justices on the Court argued that representation needed to be substantive where the representatives resembled and acted on behalf of the people, preserving a close connection between the representative and the group. Throughout the 1970s and 1980s, Liberal Justices argued that voting concerned the ability of a group to represent a candidate of choice and if state legislators threatened that choice it diminished the democratic experience. For example, dissents in *Gaffney* v. *Cummings*, *Beer* v. *United States*, and *Mobile* v. *Bolden* argued that redistricting maps that diminished the ability of groups to participate in the electoral process were unconstitutional. Majority or plurality opinions in *City of Rome* v. *United States*, *Rodgers* v. *Lodge, Davis* v. *Bandemer,* and *Gingles* v. *Thornburg* protected the right of groups to participate in the electoral process and believed that this group right to representation enhanced the democratic experience necessary to sustain the American democracy.

These competing visions of representation created a disparity of democracy enacted within our political institutions. The Conservatives Justices' vision of representation created an ideology of political fairness whereby the state legislators could determine what constituted fairness, which usually referred to fairness for the state legislators and the political parties to conduct apportionment. The entailment of this view was that the political institutions worked best if they featured an elite view of representation that diminished the role and voice of the people to deliberate about their

government and the distribution of resources. Additionally, the judiciary must allow the political institutions to develop this elite view of democracy and the judiciary must abstain from encroaching on the power of the partisan groups and political institutions. Conversely, the Liberal Justices' vision of representation constituted an ideology of political fairness that fostered the ability of political groups to compete in the democratic process. In this view, a democracy works best if citizens can form themselves into groups and state legislators represent those groups by resembling them and working to secure legislation on their behalf. Consequently, political institutions ought to protect the ability of political and racial groups to participate in self-government and, if there are threats to that ability, the judiciary must protect that right.

During the 1990s and 2000s, the Supreme Court's decisions in reapportionment and redistricting focused on an ideology of political reconciliation, especially between competing racial groups. Redistricting maps concern not only the division of political power within a state but the way in which citizens from different racial groups achieve racial reconciliation and integration in the face of racial problems throughout the history of the United States. At stake in these decisions is to what degree apportionment and districting plans can promote the interests of racial groups and whether or not the Constitution contains a color-blind ideology.

Similarly to the decisions in the 1970s and 1980s, the Justices divided themselves according to a political ideology. Conservatives Justices argued that the state must treat citizens and individuals rather than as members of a racial group. To stereotype an

individual based on immutable characteristics is to threaten the dignity of the person and to deny that person constitutional protection under the Fourteenth Amendment. To avoid this constitutional harm, state legislators must develop redistricting plans where race is not the predominant factor. Consequently, to assure the people that race is not a factor, the Conservative Justices argue that the legislative and political branches need to interpret the Constitution as being color-blind in hopes to reduce the visibility of race in American society. By seeing past race in representation, the Conservative Justices desire that race disappears as a motivating factor in redistricting plans.

Conversely, the Liberal Justices argue that racial groups should receive equal protection as other ethnic or political groups receive protection. While these Justice hold the view that race may always be a factor in political life, the Liberal Justices argue that if reconciliation were to occur, it will occur through the integration of ethnic and political groups rather than ignoring racial and political groups. As the history of racially polarized voting shows without protection for racial minorities, racial minorities will not receive political benefits in society as the dominant majority will rely on institutional constraints to prevent political equality. Additionally, the Liberal Justices argue against the creation of the new substantive right to a color-blind districting process as the creation of the right by Conservative Justices violates the limited ethos of the judiciary in apportionment law. Further, according to the Liberal Justices, the activism of the Conservative Justices in the area of racial gerrymandering contradicts their arguments for judicial abstention and legislative supremacy in political gerrymandering cases.

Since the Supreme Court's entrance in the Reapportionment Revolution, the Court reconstituted representation and increased access to political participation. As Nathaniel Persily, Thad Kousser, and Patrick Egan note, the decisions by the Supreme Court increased the availability of democracy but at a cost of decreasing electoral competition and an increase in incumbent protection.[14] While in certain instances reapportionment plans such as *Gaffney v. Cummings* concern the creation of proportional representation and political fairness for the political parties, this does not mean there is a healthy democracy available to the people in Connecticut. Grant M. Hayden writes that the Supreme Court's entrance into the political thicket fulfilled the warnings of Justice John Marshall Harlan that the Court would be more and not less involved in reapportionment.[15] Yet, Without the Supreme Court's entrance in the Reapportionment Revolution, citizens would still be subject to the discretion of the state legislators and the country would not adhere in any form to its democratic ideals. Though there is criticism of the Court's involvement in the Reapportionment Revolution, these articles suggests that more work needs to be done to expand the democratic experience in the United States.

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[14] Nathaniel Persily, Thad Kousser, and Patrick Egan, "The Complicated Impact of One Person, One Vote on Political Competition and Representation," *North Carolina Law Review* 80 (2002): 1300.

[15] Grant M. Hayden, "The Supreme Court and Voting Rights: A More Complete Exit Strategy," *North Carolina Law Review* 83 (2005): 950.

Future Research on Rhetoric and Redistricting

Throughout the reapportionment and redistricting decisions, further questions emerge over how the Supreme Court develops and negotiates the democratic experience and possibility for political deliberation to sustain that difference. One area of research would be to examine the connection between partisan gerrymandering and the protection of first amendment rights. In his concurring opinion in *Vieth* v. *Jubelirer*, Justice Kennedy notes that the briefs for the case argue partisan gerrymandering in terms of a violation of First Amendment rights. Consequently, Justice Kennedy states "the First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering."[16] This area of research would examine an attempt to establish interpretive dominance by reframing a discussion of voting rights to include a discussion over "whether or not political classifications were used to burden a group's representational rights."[17] If employers cannot discriminate against employees because of their political views, this research would examine to what extent political parties can employ the government create burdens or to discriminate against citizens of a state because of the views they possess. The research would also examine the entailment of the switch from a Fourteenth Amendment basis of law to a First Amendment basis, especially for other types of reapportionment and redistricting law.

Another area of research would seek to provide a better theoretical foundation from the literature on visual rhetoric to discuss the aesthetics of redistricting. Throughout

[16] *Vieth* v. *Jubelirer*, 541 U.S. 267, 314 (2004).

[17] *Vieth* v. *Jubelirer*, 541 U.S. 267, 315 (2004).

the Supreme Court's jurisprudence, arguments from aesthetics rather than accountability govern the way in which state legislators and citizens engage in debate over redistricting. The struggle to determine a valid redistricting plan rests not on the ability to discuss the district in terms of the way in which the representative is or is not responsive to the constituents in the district but whether or not the normative elements of aesthetics could allow for integration or division. Exacerbating the role of the aesthetics, and the development of representation for members in society, is the role of technology. Because humans rely on technology to precisely shape each turn of a district's boundaries, state legislators possess the ability to enhance or diminish the democratic experience for their citizens. This research would examine in detail the ways in which aesthetics define and develop the meaning of the democratic experience and find ways to redefine the debate over aesthetics to promote a view of democratic accountability that enhances the democratic experience.

Finally, additional research needs to examine the proposals and consequences of "non-partisan" or "impartial" redistricting commissions. During the 2004 elections, citizens in California and Ohio rejected ballot initiatives that would turn the responsibility for districting to non-partisan agencies. This research would examine the extent to which non-partisan review boards create fair representation for citizens as well as political parties, e.g. *Gaffney* v. *Cummings*, and the ways in which citizens, politicians, and the impartial boards attempt to persuade or dissuade voters that these boards should adopt these initiatives to reform the political process. This research will provide a great example of

how citizens and representatives conceive of democracy as well as how they work to persuade the American polity over the ideal form of the American democracy.

At the beginning of this dissertation, the poems by Walt Whitman and Langston Hughes examine the progression of American democracy and the development of the democratic experience. While Whitman speaks of inclusion, Hughes speaks of exclusion. The history of voting rights within the United States concerns the expansion of the right to vote while opposition groups prevent the development of the meaning of the right to vote. The Supreme Court's decisions in its reapportionment and redistricting decisions follow this expansion and exclusion that forms the basis for the constitution of the democratic experience in America.

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